89-771

No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF LOUISIANA, *ex rel.* CHARLES E. "BUDDY" ROEMER, III, GOVERNOR OF THE STATE OF LOUISIANA, BOARD OF REGENTS OF THE STATE OF LOUISIANA, BOARD OF TRUSTEES FOR LOUISIANA STATE COLLEGES AND UNIVERSITIES, AND BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from a Three-Judge United States District Court for the Eastern District of Louisiana

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether the existence of predominantly white and predominantly black public institutions of higher education alone forms an adequate basis for a finding of liability under Title VI of the Civil Rights Act of 1964 or the Fourteenth Amendment to the Constitution of the United States, in a formerly *de jure* state, under circumstances in which:

   a. all such institutions have been open to all qualified applicants, regardless of race, for more than twenty-five years;

   b. extensive good faith efforts have been undertaken by the state to increase racial diversity in the institutions;

   c. no racial discrimination is alleged to have occurred since the end of the *de jure* era; and

   d. the current racial composition of the institutions is solely the product of unfettered student choice.

2. Whether there is an adequate record in the court below to support, as a remedy, the merger of the Louisiana State University Paul M. Hebert Law Center and the Southern University Law Center, where no party presented that issue to the trial court, no party recommended that remedy and no evidence was taken regarding the feasibility, appropriateness or educational soundness of such a merger.

PARTIES TO THIS ACTION

The parties in the proceedings before the three-judge district court which are not listed in the above caption are:

1. The Board of Supervisors of Southern University and Agricultural and Mechanical College ("Southern University"), defendant;

2. The Louisiana State Board of Elementary and Secondary Education, defendant;

3. The St. Bernard Parish School Board, defendant;

4. The Bossier Parish School Board, defendant;

5. The State Superintendent of Public Education, defendant;

6. The Superintendent of Schools for Bossier Parish, defendant; and,

7. The Superintendent of Schools for St. Bernard Parish, defendant.*

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* The defendants listed above as 2 through 7 were added by the plaintiff United States for their supervisory roles over the Bossier Parish Community College and the St. Bernard Parish Community College. *United States v. Louisiana*, 692 F. Supp. 642, 647 (E.D. La. 1988), Order and Reasons on Summary Judgment ("Order and Reasons I"), Joint Appendix to Jurisdictional Statement filed by the Louisiana Attorney General and Southern University, Nos. 89-556 and 557, ("Joint Appendix") at 10a-11a. *See also* Amended Complaint filed November 12, 1980 ("Amended Complaint"), Joint Appendix at 166a-67a. The parties named in the caption and listed in 1, 2, 3 and 4 were parties to the consent decree entered into and approved by the lower court on September 8, 1981 ("Consent Decree"). Consent Decree, Joint Appendix at 237a. The Bossier Parish School Board, joined by the Louisiana State Board of Elementary and Secondary Education, filed a motion for summary judgment which was granted by the court. *Louisiana*, 692 F. Supp. at 659, Order and Reasons I, Joint Appendix at 38a. Although no motions for summary judgment were filed by those parties listed above in 3, 5, 6 and 7, none of those parties was included in the trial court's orders.

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JURISDICTIONAL STATEMENT

The State of Louisiana (the "State"), through its Governor, Charles E. "Buddy" Roemer, III, the Board of Regents of the State of Louisiana ("Regents"), the Board of Trustees for Louisiana State Colleges and Universities ("Trustees"), and the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College ("LSU"), appeal from the judgment of the three-judge United States District Court for the Eastern District of Louisiana dated August 2, 1988, Order and Reasons on Summary Judgment ("Order and Reasons I"), Joint Appendix at 3a, holding the State, Regents, Trustees, LSU and the Board of Supervisors of Southern University and Agricultural and Mechanical College ("Southern University") (collectively the "defendants") liable for violating Title VI of the Civil Rights Act of 1964 §§ 601 and 602 (codified as amended, 42 U.S.C. §§ 2000d, 2000d-1 (1982)) ("Title VI"), because the court found the institutions of public higher education in Louisiana to be racially identifiable. *United States v. Louisiana*, 692 F. Supp. 642, 658 (E.D. La. 1988), Order and Reasons I, Joint Appendix at 34a.

The State, Regents and LSU also appeal from those portions of the judgments entered by the three-judge district court on July 19, 1989, entitled Opinion and Order, Joint Appendix at 50a, 60a-62a, 71a-73a, and August 4, 1989, entitled Order and Reasons ("Order and Reasons II"), Joint Appendix at 78a, and Supplemental Order, Joint Appendix at 105a, and Reasons for Ruling, Joint Appendix at 92a-96a, ordering the merger of the LSU Paul M. Herbert Law Center and the Southern University Law Center. Should this Court determine that liability does exist, the State, Regents, Trustees and LSU support all other aspects of the trial court's remedy. Because none of its constitutent institutions is involved, Trustees takes no position with respect to the merger of the law schools.

OPINIONS BELOW

Order and Reasons I is reported at *United States v. Louisiana*, 692 F. Supp. 642 (E.D. La. 1988). Order and Reasons I, Joint Appendix at 3a. Opinion and Order is reported at *United States v. Louisiana*, 718 F. Supp. 499 (E.D. La. 1989). Opinion and Order, Joint Appendix at 39a. Order and Reasons II and Supplemental Order are reported at *United States v. Louisiana*, 718 F. Supp. 521 (E.D. La. 1989). Order and Reasons II and Supplemental Order, Joint Appendix at 78a and 105a. Reasons for Ruling is reported at *United States v. Louisiana*, 718 F. Supp. 525 (E.D. La. 1989). Reasons for Ruling, Joint Appendix at 81a.

JURISDICTION

The complaint filed by the United States ("the Government") on March 14, 1974 ("Complaint"), alleges that the State and its various boards and agencies governing public higher education in Louisiana violated Title VI and the Fourteenth Amendment.[1] Complaint, Joint Appendix at 153a. On motion by the Government, pursuant to 28 U.S.C. 2281 (1970) (repealed 1976) and 28 U.S.C. § 2284 (1982), a three-judge district court was convened on March 28, 1974. Request for a Three-Judge Court, Joint Appendix at 184a; Memorandum In Support of the Request for a Three-Judge Court, Joint Appendix at 185a; Order, Joint Appendix at 197a. Jurisdiction was proper under 28 U.S.C. § 1345 (1982) and 42 U.S.C. §§ 2000d, 2000d-1 (1982). *Louisiana*, 692 F. Supp. at 646, Order and Reasons I, Joint Appendix at 10a.

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[1] Although the Government brought suit under the Fourteenth Amendment as well as Title VI, the court limited its holding to Title VI. The defendants disputed whether the Government had standing to assert claims directly under the Fourteenth Amendment. The court declined to rule on the standing question because it viewed the relief available in a school desegregation suit brought under the Fourteenth Amendment to be identical to that available to the Government under Title VI. *Louisiana*, 692 F. Supp. at 649-50, Order and Reasons I, Joint Appendix at 16a-17a.

On August 2, 1988, the three-judge district court granted the Government's motion for partial summary judgment, finding the defendants liable for violating Title VI. *Louisiana*, 692 F. Supp. at 658-59, Order and Reasons I, Joint Appendix at 37a-38a. The court entered its judgment on July 19, 1989, ordering the implementation of a remedial plan to desegregate public higher education in Louisiana. *Louisiana*, 718 F. Supp. at 499, Opinion and Order, Joint Appendix at 39a.

On August 4, 1989, the court ruled on motions for a new trial, motions to alter or amend judgment and motions to grant a stay pending appeal submitted by Southern University,[2] Grambling State University ("Grambling") Alumni Association as *amicus*,[3] the Louisiana Attorney General[4] and the Government.[5] *Louisiana*, 718 F. Supp. at 521, Order and Reasons II and Supplemental Order, Joint Appendix at 78a, 105a. On August 18, 1989, this Court granted Southern University's application and the Louisiana Attorney General's motion for stay of judgment. *Louisiana ex rel. Guste v. United States*, 110 S. Ct.

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[2] Motion for a New Trial and/or Motion to Alter or Amend Judgment; Notice of Motion; Memorandum in Support Thereof, Joint Appendix at 739a; Memorandum in Support of Motion for Stay of Execution of Judgment Pending Motion for a New Trial and/or to Alter or Amend Judgment; Alternative Motion for Stay and Execution of Judgment Pending Appeal With Affidavits (corrected copy), Appendix at 73a. Appendix refers to the Appendix submitted simultaneously with this Jurisdictional Statement filed by the State, through its Governor, Regents, Trustees and LSU.

[3] Motion and Memorandum to Amend or Alter Order Under Rule 59(e), Joint Appendix at 779a.

[4] Notice to Join in Motion of Southern University Board of Supervisors for a New Trial and/or Motion to Alter or Amend Judgment, Appendix at 85a; Motion to Withdraw "Notice to Join in Motion of Southern University Board of Supervisors for a New Trial and/or Motion to Alter or Amend Judgment" and Motion to Enroll Counsel of Record, Appendix at 87a; Order, Appendix at 91a.

[5] United States' Motion for Reconsideration and to Alter or Amend Judgment, Joint Appendix at 785a.

18 (1989), Order in Pending Case, Joint Appendix at 2a. The State, Regents, Trustees and LSU filed a timely notice of appeal to this Court on September 29, 1989 in the United States District Court for the Eastern District of Louisiana. Notice of Appeal, Appendix at 210a.

This Court has jurisdiction of this appeal under 28 U.S.C. § 1253 (1982) and 28 U.S.C. §§ 2281, 2284. *See* discussion *infra* at 8.[6]

CONSTITUTIONAL PROVISIONS AND RULES

The following is a list of constitutional provisions, statutes, ordinances and regulations involved in this case and the appropriate appendix reference for each:

1. U.S. Const. amend. XIV, § 1, reprinted in Appendix at 92a.
2. 28 U.S.C. § 1253 (1982), reprinted in Joint Appendix at 109a.
3. 28 U.S.C. § 1345 (1982), reprinted in Appendix at 94a.
4. 28 U.S.C. § 2281 (1970) (repealed 1976), reprinted in Joint Appendix at 109a.
5. 28 U.S.C. § 2282 (1970) (repealed 1976), reprinted in Joint Appendix at 109a.
6. 28 U.S.C. § 2284 (1982), reprinted in Joint Appendix at 110a.
7. 42 U.S.C. § 2000d (1982), reprinted in Joint Appendix at 115a.
8. 42 U.S.C. § 2000d-1 (1982), reprinted in Appendix at 95a.
9. Pub. L. No. 94-381, §§ 1, 7, 90 Stat. 1119, 1120 (1976), reprinted in Joint Appendix at 112a.
10. La. Rev. Stat. Ann. §§ 17:3121-3133, 3201-3383, reprinted in Joint Appendix at 126a-52a, 1048a-67a.

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[6] The Government has suggested that a three-judge district court may not have been required under 28 U.S.C. § 2281. Memorandum for the United States in Opposition to Applications to Stay (Nos. A-126 and A-127) (filed August 15, 1989) at 11-13.

11. La. Const. art. VIII, §§ 5-7, reprinted in Joint Appendix at 117a.

STATEMENT OF THE CASE

The Government brought this action in 1974, alleging that the State and its various boards and agencies governing public higher education in Louisiana violated Title VI and the Fourteenth Amendment. The Government filed a motion for a three-judge court pursuant to 28 U.S.C. §§ 2281 and 2284. 28 U.S.C. §§ 2281, 2284, Joint Appendix at 109a, 184a. A three-judge district court was convened. Order, Joint Appendix at 197a. On September 8, 1981, without any admission of liability on the part of the defendants, the parties to this action entered into the Consent Decree which was approved by the court.[7] Consent Decree, Joint Appendix at 199a, 256a. *See also Louisiana*, 692 F. Supp. at 647, Order and Reasons I, Joint Appendix at 11a. In December 1987, just prior to its expiration and in accordance with the terms of the Consent Decree, the Government filed a motion for a hearing to determine whether a unitary system of higher education in Louisiana had been achieved. *Louisiana*, 692 F. Supp. at 648, Order and Reasons I, Appendix at 14a-15a. The court never conducted the hearing but rather requested motions for summary judgment. Minute Entry of March 31, 1988, Appendix at 5a. After motions for summary judgment, oppositions and cross-motions were filed, the trial court, on August 2, 1988, granted the Government's motion for partial summary judgment on the issue of liability finding various defendants liable for violating Title VI. *Louisiana*, 692 F. Supp. at 658-59, Order and Reasons I, Joint Appendix at 36a-38a.

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[7] The introduction to the Consent Decree provides in part: "It is the specific understanding of the parties and of this Court that neither this Consent Decree nor defendants' consent thereto constitute an admission by defendants or an adjudication by the Court of any violation of law by defendants." Consent Decree, Joint Appendix at 200a.

The court then instructed the parties to submit proposed plans to desegregate public higher education in Louisiana. Minute Entry of October 7, 1988, Appendix at 7a. The State, while still contesting liability, but compelled to follow the orders of the court, submitted Proposed Plan to Desegregate the System of Public Higher Education in the State of Louisiana Submitted by Governor Charles E. "Buddy" Roemer, III on Behalf of the State of Louisiana ("the State Plan") to the court, which emphasized the replacement of Louisiana's current four public higher education governing boards with a single governing board which would be responsible for studying and implementing effective measures to desegregate further Louisiana's state colleges and universities.[8] The State Plan was premised on the Proposed Plan to Desegregate the System of Public Higher Education in the State of Louisiana, a report formulated by a bipartisan task force appointed by Governor Roemer, in response to the trial court's finding of liability. The purpose of this task force was to study the issues and propose a viable solution to the racial identifiability of Louisiana's public higher education institutions. *See* Final Report, Joint Appendix at 638. The Government and Southern University submitted separate desegregation plans which relied heavily on the substantial expenditure of so-called "enhancement" dollars by the State at the predominantly black institutions. The Special Master specifically noted and discussed the Government's and Southern University's reliance on the enhancement of predominantly black schools as a remedy. *See id.* at 641a, 645a.

The trial court, dissatisfied with the parties' failure to reach consensus on a plan, appointed Paul R. Verkuil, former Dean of Tulane Law School and current President of the College of William and Mary, as Special Master to take and consider evidence and draft a proposed plan for the court's consideration. Order of Ref-

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[8] For summary discussion of the State Plan, see Final Report, Joint Appendix at 637a.

erence of December 2, 1988, Appendix at 1a. Special Master Verkuil permitted the parties until January 20, 1989, to submit amended desegregation plans, if they wished, and until February 1, 1989, to submit direct evidence in the form of expert and lay witness reports in support of or in opposition to the various parties' plans.[9] After extensive discovery, which included the depositions of thirty-three witnesses, Final Report, Joint Appendix at 628a, the Special Master scheduled a hearing for March 6, 1989, during which expert and lay witnesses were to be cross-examined on their testimony. *Id.* at 627a. Shortly before the hearing was scheduled to begin, the parties engaged unsuccessfully in settlement negotiations. *Id.* at 629a. By agreement of all of the parties, in exchange for delaying the hearing for further settlement discussions, the depositions were offered into evidence in lieu of cross-examination, and only rebuttal testimony was presented in open court. *Id.*

Following this hearing, on April 18, 1989, the Special Master distributed his Recommended Remedial Plan and solicited comments from the parties. Minute Entry of April 18, 1989, Appendix at 11a. The parties filed responses to the Recommended Remedial Plan, Final Report, Joint Appendix at 629a, and the Special Master heard oral argument on the parties' proposed modifications. *Id.* The Special Master modified the Recommended Remedial Plan and submitted a Final Report on May 30, 1989, to the three-judge district court for its consideration. Final Report, Joint Appendix at 623a. The Special Master's Final Report substantially resembled the State Plan, supported by the State, Regents, Trustees and LSU.

The district court adopted the Special Master's Final Report almost in its entirety, and, on July 19, 1989, the court entered its Opinion and Order. *Louisiana*, 718 F.

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[9] Minute Entry dated December 16, 1988, Appendix at 9a. For a list of the 78 witnesses who submitted written direct testimony, see Final Report, Joint Appendix at 709a-15a.

Supp. at 499. Opinion and Order, Joint Appendix at 39a. However, unlike the Special Master's Final Report, the court in its order required the merger of the LSU Paul M. Hebert Law Center and the Southern University Law Center. *Louisiana*, 718 F. Supp. at 507, 513-15, 518-19, Opinion and Order, Joint Appendix at 50a, 60a-62a, 71a-73a. Prior to this time, merger of the law schools had not been an issue, no party had recommended that remedy and no party had presented evidence with respect to it.[10]

On August 4, 1989, the court ruled on post-trial motions submitted by Southern University, the Grambling Alumni Association and the Louisiana Attorney General. *Louisiana*, 718 F. Supp. 521, Order and Reasons II and Supplemental Order, Joint Appendix at 78a, 105a; *Louisiana*, 718 F. Supp. 525, Reasons for Ruling, Joint Appendix at 81a. *See also supra* notes 2-4. After the court denied Southern University's motion for stay, Southern University and the Louisiana Attorney General filed, respectively, an application for stay and motion for stay with this Court. The Government and the State opposed the application and motion, but on August 18, 1989, the Court granted the stay.

The State, Regents, Trustees and LSU filed a Notice of Appeal to this Court in the district court on September 29, 1989.

DISCUSSION OF JURISDICTION

This Court "[has] jurisdiction under 28 U.S.C. § 1253 only if a three-judge court was required by 28 U.S.C. § 2281."[11] *Chapman v. Meier*, 420 U.S. 1, 13 (1975).

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[10] For a discussion of evidence presented by the parties on the general issue of merger, see Final Report, Joint Appendix at 647a.

[11] 28 U.S.C. § 1253 provides:

> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by

Under 28 U.S.C. § 2281, a three-judge district court is required when a party seeks "[a] . . . permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute . . . upon the ground of the unconstitutionality of such statute . . . ." [12]

Although this Court has strictly construed 28 U.S.C. § 2281, *see Allen v. State Board of Elections*, 393 U.S. 544, 561 (1959), "[it has] not been unaware of the legitimate reasons that prompted Congress to enact three-

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any Act of Congress to be heard and determined by a district court of three judges.

As observed by this Court, "[p]erhaps the oddest feature of § 1253 is that it conditions this Court's appellate jurisdiction on whether the three-judge court was correctly convened." *Gonzalez v. Automatic Employees Credit Union*, 419 U.S. 90, 95 n.12 (1974). Thus, "in struggling to make workable sense of [sections 1253, 2281, and 2282, this] Court has not infrequently been induced to retrace its steps." *Id.* at 96.

Commentators attribute the Court's struggle with these sections to the large number of cases heard by three-judge courts. *See, e.g.*, 17 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4040 (2d ed. 1988) [hereinafter "17 *Wright & Miller*"]; 12 J. Moore, H. Bendix & B. Ringle, *Moore's Federal Practice* (2d ed. 1989) ¶ 421.03[2]. For example, in 1970, there were 291 three-judge court hearings; in 1971, 318; in 1972, 310; and in 1973, 320. Ann. Rep., Administrative Office of the United States Courts, 1974, p. 241, Table 58, Appendix at 185a.

One leading treatise suggests that, as a step toward alleviating the confusing case law which has resulted from this struggle, "[j]udgments entered by the three-judge court should be subject to review by the Supreme Court, without regard to whether a three-judge court was actually required." 17 *Wright & Miller*, *supra*, § 4040, at 139.

[12] Although 28 U.S.C. § 2281 was repealed, Pub. L. 94-381, § 1, 90 Stat. 1119 (1976), Joint Appendix at 112a, it still applies "to any action commenced on or before the day of enactment [August 12, 1976]." Pub. L. 94-381, § 7, 90 Stat. 1120, Joint Appendix at 114a. *See Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 30 n.1 (1980). This action was commenced on March 14, 1974.

judge court legislation." *Id.* at 562. Specifically, this Court has observed:

> Section 2281 was designed to provide a more responsible forum for the litigation of suits which, if successful, would render void state statutes embodying important state policies. . . . It authorizes direct review by this Court, 28 U.S.C. § 1253, as a means of accelerating a final determination on the merits; an important criticism of the pre-1910 procedure was directed at the length of time required to appeal through the courts to the Supreme Court . . . .
>
> . . . .
>
> . . . [T]he purpose of the three-judge scheme was in major part to expedite important litigation: it should not be interpreted in such a way that litigation . . . is delayed while the proper composition of the tribunal is litigated.

Swift & Co. v. Wickham, 382 U.S. 111, 119-120, 124 (1965). *See also MTM, Inc. v. Baxley*, 420 U.S. 799, 805 (1975) (White, J., concurring) ("[The three-judge court] procedure was adopted to protect state statutes from improvident injunctions issued by a single federal judge on federal constitutional grounds."). The Court has also concluded that "[n]otwithstanding the problems for judicial administration, Congress has determined that three-judge courts are desirable in a number of circumstances involving confrontations between state and federal power or in circumstances involving a potential for substantial interference with government administration." [13] *Allen*, 393 U.S. at 562.

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[13] Due to the repeal of 28 U.S.C. §§ 2281, 2282, few judicial administration problems exist today. In fact, "[t]he docket pressures that compelled distortion of § 1253 do not persist." 17 *Wright & Miller, supra* note 11, § 4040, at 142. For example, in 1988, ten hearings concerning civil rights cases were held before three-judge courts. Ann. Rep., Director of the Administrative Office of the United States, 1988, p. 129, Table S-22, Appendix at 187a. In 1973, however, there were 183 hearings involving civil rights cases. Ann. Rep., Administrative Office of the United States Courts

This case presents the very issues which 28 U.S.C. § 2281 was intended to address because "if successful, [this case] would render void state statutes embodying important state policies." *Swift & Co.*, 382 U.S. at 119. The three-judge district court rendered void a number of state statutes and sections of the Louisiana Constitution which embody important state policies concerning Louisiana's higher education system. Moreover, the remedy in this case involves not merely a "potential for substantial interference with government administration," *Allen*, 393 U.S. at 562, but rather actual substantial interference with the structure of Louisiana's higher education system as well as the administration of that system.

Equally important, this case falls squarely within the parameters of 28 U.S.C. § 2281 established by this Court:

> In construing § 2281, this Court has concluded that the three-judge court procedure is brought into play in any "suit which seeks to interpose the Constitution against enforcement of a state policy, whether such policy is defined in a state constitution or in an ordinary statute or through the delegated legislation of an 'administrative board or commission.'"

Morales v. Turman, 430 U.S. 322, 323, *reh'g denied*, 430 U.S. 988 (1977) (quoting *Phillips v. United States*, 312 U.S. 246, 251 (1941)).[14]

1974, p. 241, Table 58, Appendix at 185a. (Both numbers include suits challenging the constitutionality of state statutes.)

[14] In *Morales*, the petitioners had alleged that inhumane conditions in juvenile delinquent facilities in Texas violated the Constitution. The district court found for the petitioners but the court of appeals vacated that decision, holding that a three-judge court was required under 28 U.S.C. § 2281. The court of appeals reasoned that "the challenged, unwritten practices of the [Texas officials] were revealed during trial to be statewide in impact and that therefore they were equivalent to a statute with statewide applicability within the meaning of § 2281." *Morales*, 430 U.S. at 323. This Court, in reversing the court of appeals, found that "the single District Judge properly exercised jurisdiction to decide

The Government should not now be heard to complain that a three-judge court was not appropriate in this case.[15] The Government has repeatedly contended throughout this litigation that various state statutes and sections of the Louisiana Constitution locked the State and its boards into a dual system of black and white schools that violated Title VI and the Constitution. In its Complaint filed on March 14, 1974, the Government alleged:

> Pursuant to State law, defendant Louisiana Coordinating Counsel for Higher Education has developed, proposed and submitted to State Officials a report titled *Master Plan Toward Balanced Growth in Louisiana Posthigh School Education: Quantity and Quality*, which would maintain and perpetuate the dual system of public higher education based upon race which exists within the State of Louisiana.

Complaint, Joint Appendix at 162a.[16] The Government clarified its position and further highlighted the necessity of a three-judge court in this case in a response to interrogatories filed by the State and its boards:

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this case, and that his judgment is reviewable on the merits in the Court of Appeals." *Id.* at 324.

[15] *See supra* note 6.

[16] In its Amended Complaint, the Government changed this allegation to reflect the constitutional creation of Regents in 1974. Paragraph 33 of the Amended Complaint alleges that "[p]ursuant to State law, defendant Louisiana Board of Regents has developed and proceeded to implement, a document entitled *The Master Plan For Higher Education in Louisiana*, which would maintain and perpetuate the dual system of public higher education based upon race which exists within the State of Louisiana." Amended Complaint, Joint Appendix at 176a.

Under the Louisiana Constitution of 1974, Regents "is the public body vested with the authority and power to formulate, to revise and to adopt a Master Plan for Higher Education in Louisiana." Op. La. Att'y Gen. No. 77-1379 (Oct. 7, 1977). Additionally, "the Master Plan for Higher Education in Louisiana as finally adopted by the Board of Regents does not require legislative approval." *Id.* Thus, when adopting a Master Plan, Regents acts as a legislative body.

> The [Government] does contend that both the adoption and implementation of the Louisiana Master Plan of 1978 have contributed to the perpetuation of Louisiana's dual system of higher education, and to the extent that the Master Plan does perpetuate the dual system, it does in fact violate Title VI and the Fourteenth Amendment.
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> . . . .
>
> The [Government] does contend that some of the provisions of the Louisiana Constitution of 1974 have been implemented in manner to perpetuate the racially dual system of public higher education which existed prior to the time the Louisiana Constitution was adopted and continues to exist at the present time.

United States' Answers to Interrogatories Propounded by Defendants, Appendix at 69a. The Government also specifically alleged that the "Louisiana Constitution of 1974, Article 8, Sections 5, 6, and 7" perpetuated a dual system of public higher education in Louisiana. *Id.* at 68a.

In effect, therefore, the Government has consistently argued since 1974 that numerous provisions of the Louisiana Constitution and various state statutes pertaining to higher education are unconstitutional as applied.[17] The Government in its own pleadings has stated that "in the Complaint filed by the government in the instant case, the United States seeks relief . . . which will enjoin the practices of Louisiana as applied and interpreted by the defendants and their agents." Request For A Three-Judge Court, Joint Appendix at 193a-94a.

The three-judge district court accepted the Government's invitation to strike down whole provisions of Lou-

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[17] This Court has held that "[o]ur cases . . . establish that a statute or a rule may be held unconstitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of state power is beyond question." *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971).

isiana statutory and constitutional law. In its Order and Reasons II, the district court attacked the four higher education governing board system established by the Louisiana Constitution of 1974: "We observe, however, that the segregation maintained by the four board system is incompatible with any suggestion that the four board system retains viability." *Louisiana*, 718 F. Supp. at 523, Order and Reasons II, Joint Appendix at 79a. Earlier, the three-judge court had concluded that the four board system violated the federal Constitution:

> A truism thus emerges: The present scheme for governing education in Louisiana—three operating boards and one coordinating board—has perpetuated illegal segregation in Louisiana's higher education, even though the system's creation postdates the filing of this case. The system of multiple boards is therefore a defect in the state's system of higher education that violates the federal constitution. . . .
>
> Statistics regarding student performance . . . demonstrate additional particular constitutional defects inherent in and perpetuated by Louisiana's present system of higher education.

Louisiana, 718 F. Supp. at 505, Opinion and Order, Joint Appendix at 45a.

For these reasons, 28 U.S.C. § 2281 and a three-judge court are appropriate for this case. Decisions yielding a contrary result, such as *Morales* and *Costello v. Wainwright*, 430 U.S. 325 (1977), are distinguishable and inapposite. As previously discussed, in *Morales*, the petitioners had alleged that the practices of the defendants violated their constitutional rights. *See supra* note 14. Although the court of appeals found that "there appeared to be no central body of *written* regulations governing [the defendants'] institution," it still held that a three-judge court was required. *Morales v. Turman*, 535 F.2d 864, 871 (5th Cir. 1976), *rev'd* 430 U.S. 322, *reh'g denied*, 430 U.S. 988 (1977) (emphasis added). This Court reversed after applying the broad definition of "statute" contained in *Phillips*, 312 U.S. at 251, finding that "[it]

ha[d] never considered the generalized, *unwritten* practices of administration to be equivalent to the 'delegated legislation' of an administrative board.'" *Morales*, 430 U.S. at 323 (emphasis added). Therefore, 28 U.S.C. § 2281 did not apply.

In *Costello v. Wainwright*,[18] this Court found that "the applicability of § 2281 as written turns on whether a state statute is alleged to be unconstitutional, not on whether an equitable remedy for unconstitutional state administrative *behavior* ultimately impinges on duties imposed under concededly constitutional state statutes." *Costello*, 430 U.S. at 326 (emphasis added). Because the plaintiff had only alleged that administrative behavior was unconstitutional, the Court reversed the circuit court's holding that at three-judge court was required.

Neither *Morales* nor *Costello* apply to the facts of this case. This case, unlike *Morales*, does not involve "challenged, unwritten practices of administration." *Morales*, 430 U.S. at 323. Here state officials have acted under written authority, both statutory and constitutional. Indeed, the Government has argued that "the defendants and their agents have proposed and implemented policies, practices and regulations pursuant to their statutory authority which have maintained and perpetuated an unlawful Statewide dual system of public higher education on the basis of race." Request For a Three-Judge Court, Joint Appendix at 187a n.5. This case also does not involve a situation, as in *Costello*, in which a party has requested "an equitable remedy for unconstitutional state

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[18] The Fifth Circuit in *Costello* vacated the single district court judge's decision and held that a three-judge court was required "because . . . the possible temporary suspension of an otherwise valid state statute to effectuate federally mandated relief [was the] equivalent to finding that statute unconstitutional." *Costello*, 430 U.S. at 326. The petitioners in *Costello* had alleged that the overcrowding of Florida prisons violated their constitutional rights. The district court agreed and attempted to relieve the overcrowding by issuing a preliminary injunction which might have caused Florida officials to violate their statutory duties. *Id.*

administrative behavior." *Costello*, 430 U.S. at 326. As detailed earlier, the Government has based its claim of unconstitutionality on more than just mere behavior by alleging that the implementation of Louisiana statutes and sections of the Louisiana Constitution violated Title VI and the Fourteenth Amendment.

The Court should hear this case on direct appeal. 28 U.S.C. § 2281 undeniably applies. Louisiana's entire system of public higher education, as well as the state constitutional and statutory provisions through which that system is implemented, are affected by this lawsuit, and all of higher education in Louisiana is awaiting final resolution. Until this litigation is resolved, the operation of Louisiana's colleges and universities remains subject to extraordinary confusion and instability. Indeed, this Court's own admonition that "[28 U.S.C. § 2281] should not be interpreted in such a way that . . . litigation is delayed while the proper composition of the tribunal is litigated," *Swift & Co.*, 382 U.S. at 124, has never been more appropriate, especially now that this Court's docket is no longer burdened by a large number of direct appeals from three-judge district courts.[19]

THE QUESTIONS ARE SUBSTANTIAL

The questions presented by this case are unquestionably substantial. They arise under the purview of Title VI, which prohibits the allocation of federal funds to public institutions that discriminate on the basis of race. These important and novel issues go far beyond those already considered by this Court in education desegregation cases and involve questions of both liability and remedy.

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[19] As noted, in 1988, only ten hearings involving civil rights were held before three-judge district courts. *See supra* note 13. One commentator has suggested that "[w]ith three-judge courts now virtually eliminated, it is to be hoped that the provision for direct appeal will be given a straight forward reading shorn of the complications introduced by the recent cases." 17 *Wright & Miller*, *supra* note 11, § 4235, at 626.

I. LIABILITY STANDARD

A. The Court Has Not Yet Determined The Standard For Liability For Public Higher Education Desegregation Cases

It is well-settled law that state statutes which on their face segregate public institutions on the basis of race are unconstitutional and that "separate but equal" educational institutions do not satisfy the constitutional requirement of equal protection. *See Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954). Consequently, states must adopt and implement racially non-discriminatory policies and practices in the realm of both elementary and secondary as well as higher education.[20] Lower courts also agree that, as in the context of public elementary and secondary education, states have an affirmative duty to dismantle *de jure* systems of higher education.[21] The extent of this duty has been adjudicated on the elementary and secondary school level in *Green v. School Board*, 391 U.S. 430 (1968). It has not, however, been determined by this Court in the context of higher education. Moreover, these issues are not merely of academic interest. In addition to this case, similar litigation is currently pending at the trial or appellate level in Alabama[22] and

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[20] *See Florida ex rel. Hawkins v. Board of Control*, 350 U.S. 413, 414, *reh'g denied*, 351 U.S. 915 (1956) (black applicant entitled to prompt admission to graduate program under rules and regulations applicable to other qualified applicants).

[21] *See, e.g., Geier v. University of Tenn.*, 597 F.2d 1056 (6th Cir. 1979), *cert. denied*, 444 U.S. 886 (1979); *Ayers v. Allain*, 674 F. Supp. 1523 (N.D. Miss. 1987), *appeal docketed*, No. 88-4103 (5th Cir. Feb. 11, 1988); *United States v. Alabama*, 628 F. Supp. 1137 (N.D.Ala. 1985), *rev'd on other grounds*, 828 F.2d 1532 (11th Cir. 1987), *cert. denied sub nom.* 108 S. Ct. 2857 (1988); *Norris v. State Council of Higher Educ.*, 327 F. Supp. 1368 (E.D. Va.), *aff'd sub nom. Board of Visitors v. Norris*, 404 U.S. 907 (1971).

[22] *See United States v. Alabama*, 628 F. Supp. 1137. After a trial and ruling on liability, the Eleventh Circuit disqualified the trial judge, reversed and remanded the case for a new trial. *Alabama*, 828 F.2d at 1552.

Mississippi,[23] and all Southern states are under one form or another of federal supervision over their higher education systems' compliance with Title VI.[24]

A comparison of the result and analysis of liability in *Green* to the result and analysis of liability in *Bazemore v. Friday*, 473 U.S. 395 (1986) (White, J., concurring), illustrates vividly why definitive answers to these questions are required from this Court. In *Green*, this Court held that merely instituting a "freedom of choice" plan in elementary and secondary education was not enough to satisfy the school board's duty to abolish its segregated system. *Green*, 391 U.S. at 439-441. In *Bazemore*, despite the remaining racial identifiability of university-sponsored clubs, five Justices of this Court found that implementing a racially nondiscriminatory, neutral admission policy for club membership was sufficient action by the state to overcome claims of unconstitutionality. There was no liability present in *Bazemore* because the Justices determined that the racial identifiability of the clubs was the result of voluntary and unfettered choice exercised by the student applicants.

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[23] *Ayers v. Allain*, 674 F. Supp. 1523, the Mississippi higher education desegregation case currently on appeal before the United States Court of Appeals for the Fifth Circuit, is strikingly similar to the instant case. The trial and analysis in *Ayers* provides a vivid contrast to the abbreviated treatment accorded the liability phase of this case by the three-judge court. The court in *Ayers* held a five-week bench trial, heard testimony from 71 witnesses and received 56,700 pages of exhibits. *Id.* at 1526. With the exception of the reference to enhancement dollars spent by Louisiana, the trial court in the instant case made limited reference to the affirmative action in which Louisiana engaged. Similarly, in Alabama's higher education desegregation case, the court conducted a month-long trial and made detailed findings. *Alabama*, 828 F.2d at 1535-36.

[24] *See Adams v. Richardson*, 356 F. Supp. 92, 94 (D.D.C.), *modified*, 480 F.2d 1159, 1164 (D.D.C. 1973). Ten states have been identified for federal scrutiny of their compliance with Title VI. This scrutiny has continued for over fifteen years. *See, e.g., Adams v. Bennett*, 675 F. Supp. 668 (D.D.C. 1987), *rev'd sub nom. Women's Equity Action League v. Cavazos*, 879 F.2d 880 (D.C. Cir. 1989).

Although the conclusions are opposite, *Green* and *Bazemore* are consistent. Attendance in elementary and secondary school is compulsory; membership in a university-sponsored club is not. Five Justices of this Court in *Bazemore* reasoned that a state maintains significantly more control over elementary and secondary school enrollment than over voluntary club membership and is, therefore, in a position to achieve substantially greater integrative results, as measured solely by racial composition. *Bazemore*, 478 U.S. at 409 (White, J., concurring). The element of free choice dramatically limits this control. Students enrolled in public higher education exercise similar free choice when they decide which college to attend or even whether to attend college at all. There is, however, no Supreme Court precedent directly on point insofar as public higher education is concerned.

The parties to this lawsuit do not question that the State, having once maintained a *de jure* system of public higher education, has an affirmative duty to eliminate vestiges of that system.[25] All of the defendants, however, including predominantly black Southern University,[26] contend that this duty was satisfied by opening Louisiana's schools to students of all races and by other substantial affirmative action measures employed by the State for more than a quarter century. Affidavit of Sharon Beard dated May 12, 1988 ("Beard Affidavit"), Appendix at 127a.[27] *See also infra* note 31. Indeed, all

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[25] *See Milliken v. Bradley*, 433 U.S. 267, 289-90 (1977), *cert. denied*, 449 U.S. 870 (1980). *See also Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15, *reh'g denied*, 403 U.S. 912 (1971).

[26] *See* Jurisdictional Statement of Southern University (No. 89-577) at 26-28.

[27] "Since the effective date of Title VI . . . Louisiana has had a policy of open admissions for students of all races. Any graduate of a state-approved Louisiana high school is entitled to enroll at a public institution of higher education, without regard to the student's high school grade point average or scores on standardized tests." Beard Affidavit, Appendix at 127a.

parties to this action, including the Government, agree that the *Bazemore* reasoning is critical in measuring efforts made by the State in the context of public higher education desegregation.[28] The issues presented in this case, therefore, provide the Court with the timely opportunity, at last, to clarify the scope of a state's affirmative duty to disestablish a formerly *de jure* system of public higher education.

B. Racial Identifiability Alone Does Not Create A Dual System But Must Be Considered In Light of the Circumstances

This Court, in *Green*, correctly recognized that "[t]here is no universal answer to the complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present . . . ." *Green*, 391 U.S. at 439.

In determining liability, the three-judge court chose to rely inflexibly and exclusively upon the standard of liability first established in *Green*, without giving appropriate consideration to the circumstances surrounding public higher education. *Louisiana*, 692 F. Supp. at 656, Order and Reasons I, Joint Appendix at 30a-31a. By so doing, the court found the State liable solely because the racial composition of its public institutions of higher education was identifiably white and identifiably black. *Id.* at 657, Order and Reasons I, Joint Appendix at 33a. The racial mix litmus test applied in *Green*, however, while wholly appropriate for elementary and secondary school desegregation cases, cannot logically be applied here. Attendance at public elementary and secondary schools is compulsory. Students attend free of tuition

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[28] *See* Motion of the United States for Summary Judgment on the Issue of Liability, Joint Appendix at 285a-86a. The three-judge court noted that the Government's reliance on *Bazemore* was curious because if the *Bazemore* standard had been applied the State would not have been held liable for violating Title VI. *Louisiana*, 692 F. Supp. at 656 n.70, Order and Reasons I, Joint Appendix at 30a.

and academic programs are, by and large, fungible.[29] States maintain control over public elementary and secondary schools by empowering school boards to create school attendance areas and "otherwise [to] designate the school that particular students may attend." *Bazemore*, 478 U.S. at 408 (White, J., concurring). Desegregation in that context, therefore, is merely a function of whether the buses roll. Such control is not available in public higher education where attendance is voluntary, tuition is charged and programs are diverse.

The circumstances in higher education are inherently and fundamentally different from those in elementary and secondary education because student choice is such an important determining factor. As early as 1969, this Court acknowledged the distinction when it affirmed a three-judge court decision which recognized the effect of student choice in higher education. The lower court in *Alabama State Teachers Association v. Alabama Public School and College Authority*, 289 F. Supp. 784, *aff'd*, 393 U.S. 400 (1969) ("*ASTA*"), observed:

> Public elementary and secondary schools are traditionally free and compulsory. . . .
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> Higher education is neither free nor compulsory. Students choose which, if any, institution they will attend. In making that choice they face the full range of diversity in goals, facilities, equipment, course offerings, teacher training and salaries, and living arrangements . . . .

289 F. Supp. at 787-88.

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[29] Elementary and secondary schools in a single district tend to be fungible in the sense that they generally strive toward uniformity in offerings, facilities and services. The opposite is true in higher education. . . . Indeed, the uniqueness of institutions which results from the confluence of course offerings, services, size, location, faculty and students found at each institution, explains why freedom of choice is so valued and why the courts have not required the restriction of student choice in higher education.

Ayers, 674 F. Supp. at 1554.

Additionally, the ASTA Court emphasized the importance of Alabama's good faith in assessing its affirmative duty, a consideration of little or no consequence in the context of elementary and secondary education: "As long as the [S]tate and a particular institution are dealing with admissions, faculty and staff in good faith the basic requirement of the affirmative duty to dismantle the dual system on the college level, to the extent that the system may be based upon racial considerations, is satisfied." *Id.* at 789, 790. Here, the trial court failed to accord any weight to the State's good faith implementation of substantial affirmative action measures.

A majority of this Court also recognized the significance of free choice in *Bazemore*. There, five Justices observed that disestablishing segregated 4-H and Homemaker clubs and opening these clubs to any eligible person, regardless of race, was sufficient action by the defendant, the North Carolina Extension Service, to satisfy the Constitution. *Bazemore*, 478 U.S. at 408 (White, J., concurring). These Justices assessed the effectiveness of the defendant's open membership policy in reaching this conclusion and did so in light of the circumstances surrounding the case, an analysis perfectly consistent with *Green* and the principles of good faith and free choice identified in *ASTA*. They took into consideration that there was no evidence of racial discrimination in membership, policy or qualifications and cited the district court's finding that any racial imbalance which may have existed after the clubs were opened "was the result of wholly voluntary and unfettered choice of private individuals." *Bazemore*, 478 U.S. at 407 (White, J., concurring).

Public higher education, like the clubs in *Bazemore*, is voluntary and noncompulsory. College students may choose to attend whatever school they wish, public or private, in-state or out, regardless of their race and for whatever reasons they wish. Students may even choose not to attend college at all. Under these circumstances, which *Green* says must be considered, racial identifiabil-

ity alone in a state's public higher education system does not violate Title VI or the Fourteenth Amendment any more than did the racial identifiability of the clubs in *Bazemore*.[30]

The standards in *Green* and *Bazemore* are consistent and must be read together. As instructed in *Green*, the district court should have evaluated the circumstances which surround Louisiana public higher education to assess correctly the effectiveness of the numerous measures implemented by the State to dismantle Louisiana's formerly *de jure* system. Had the trial court undertaken such an analysis for Louisiana, it would have found no liability.

C. Louisiana Has Satisfied Its Affirmative Duty And Has Created A Unitary System Of Public Higher Education Even Under The Trial Court's Literal Application Of *Green*

Even if the three-judge court's inflexible application of *Green* to the instant case were correct, it should have found for the State. In an effort to comply with its responsibility to effectuate a transition from a *de jure* system to a unitary system, the respondent school board in *Green* adopted a "freedom of choice" plan for desegregating the public elementary and secondary schools. *Green*, 391 U.S. at 433-34. The effectiveness of the *Green* plan was measured by observing the continued racial segregation in the schools three years after the plan had been in effect. *Id.* at 441. Because no white student chose to attend the all black school, and because only 15% of the black students enrolled in the system attended the previously all white school, this Court held that the plan did not satisfy the school board's duty to dismantle the dual system. *Id.*

Here, however, unlike *Green*, 56.4% of black Louisiana students who enrolled in a Louisiana public college or uni-

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[30] "[T]he mere continued existence of single-race clubs does not make out a constitutional violation. As the District Court found, one's choice of a Club is entirely voluntary." *Bazemore*, 478 U.S. at 408 (White, J., concurring).

versity in 1988 enrolled in a predominantly white institution. *Louisiana*, 718 F. Supp. at 506, Opinion and Order, Joint Appendix at 47a. *See also* Statewide Student Profile System, 1987-88 ACT Data, Report II, State's Exhibit 6(b), admitted at hearing before Special Master March 14, 1989, Appendix at 200a. For example, in the fall of 1988, LSU's Baton Rouge campus, LSU-A&M, enrolled almost 2,000 black students and the University of New Orleans, a constituent institution of LSU, enrolled almost 2,500 black students. *Louisiana*, 718 F. Supp. at 504, Opinion and Order, Joint Appendix at 43a. Overall, more than 5,000 black students were enrolled in the LSU system in 1988. *Id.* In 1988, Trustees' constituent institutions enrolled more than 16,700 black students, and more than 11,000 black students, even if predominantly black Grambling's black enrollment is excluded from the count. *Id.* Although the Southern University system and Grambling enrolled far fewer numbers of students in 1988 than either LSU or Trustees, more than 1,000 white students chose to enroll in these institutions during that year. That number is more than three times as many as had enrolled in 1981. *Id.* Moreover, from 1981 to 1988, white membership on Southern University's Board of Supervisors increased from 12% to 24%; black membership on Trustees' Board increased from 12% to 29%; black membership on LSU's Board increased from 6% to 24%; and, in 1988, 20% of Regents' membership was black. Beard Affidavit, Appendix at 125a.

Even the most casual observer would have to conclude that both black students and white students fully appreciate that all public institutions of higher education in Louisiana are open to students of both races. Indeed, the State accomplished far more than merely instituting a "freedom of choice" plan.[31] Considering these statistics

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[31] As part of the State's affirmative action plan, Regents prepared and disseminated no less than 12,000 informational brochures and pamphlets from 1982-83 through 1987-88 designed to encourage other-race students to apply for admission to the various public

and the extraordinary measures taken by the State to desegregate further its colleges and universities, the trial court should not have found the State liable for violating Title VI, even under that court's flawed application of *Green*.

II. MERGER

The ordered merger of the LSU Paul M. Hebert Law Center and the Southern University Law Center was

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institutions. Beard Affidavit, Appendix at 130a. Student recruitment programs designed to attract other-race students were developed by each institution and submitted to Regents. *Id.* at 131a. Regents recommended annually to the Governor and the legislature that additional monies be appropriated to predominantly black institutions for other-race recruitment as follows: Southern University in Baton Rouge, $143,294; Southern University in New Orleans, $50,095; Southern University in Shreveport, $26,000; Grambling, $99,000. These funds for other-race recruitment activities were appropriated from 1982 through 1987. *Id.* at 132a. Regents developed and adopted a policy to ensure that no Louisiana public institution of higher education would be denied equal access to public high schools to conduct student recruitment activities. *Id.* at 133a. A total of 62 new academic programs were approved by Regents for implementation at predominantly black institutions. By June 7, 1988, 19 such new programs were put into place at Southern University in Baton Rouge, 14 at Southern University in New Orleans, 18 at Grambling and 11 at Southern University in Shreveport. *Id.* at 136a. In 1982-83, the legislature appropriated $685,210 in outside-the-formula funds to predominantly black institutions for new academic program support; $3,457,343 in 1983-84; $6,641,742 in 1984-85; $11,581,220 in 1985-86; $12,793,859 in 1986-87 and $13,011,782 in 1987-88. *Id.* at 137a. Each fiscal year from 1982-83 through 1987-88, Regents recommended $70,000 for Grambling and $230,000 for the Southern University system for faculty development. *Id.* at 139a. In addition to the above-mentioned commitments, the defendants undertook a series of programs designed to promote integration in Louisiana's institutions of public higher education: employing an individual primarily responsible for recruitment of other-race students; recruitment activities at high schools having substantial other-race enrollment; development of a recruitment plan containing specific strategies for attracting other-race students; airing public service announcements; utilizing lists obtained by Regents to recruit other-race students by direct mail; and development of cooperative plans including faculty and student exchange programs. *Id.* at 144a.

without factual basis and contravened the fundamental requirements of due process.

The three-judge court ordered the merger of Louisiana's two state-supported law schools, the LSU Paul M. Hebert Law Center and Southern University Law Center. *Louisiana*, 718 F. Supp. 513-14, Opinion and Order, Joint Appendix at 60a-62a. No party recommended that remedy, no party presented the issue of law school merger to the Special Master or trial court and no evidence was taken regarding the feasibility, appropriateness or educational soundness of such a merger.

It is true that a district court "has broad power to fashion a remedy" in desegregation cases. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971). Such power is not without limitation, however. One such limitation is that imposed by the due process clause of the Fifth Amendment. "The essential requirements of due process . . . are notice and opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed actions should not be taken is a fundamental due process requirement." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985). *See also Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 313 (1950). Furthermore, "[t]he formality and procedure requisites for the hearing can vary, depending upon the importance of the interest involved and the nature of the subsequent proceedings." *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971). *See also Cleveland Bd. of Educ.* 470 U.S. at 545.

Consequently, although the "formality and procedure . . . for a hearing can vary," at least some hearing, embodying the fundamental elements of due process, is required. That did not occur here. This Court's reasoning in *Bradley v. School Board*, 382 U.S. 103 (1965), is instructive. There, the district court had approved certain plans for desegregating a public school system without a full inquiry into the petitioners' contention that faculty allocation on an alleged racial basis had an adverse impact on those plans. The court of ap-

peals affirmed, reasoning that the district court "has a large measure of discretion." This Court, reversing, held that "petitioners were entitled to [a] full evidentiary hearing . . . ." *Bradley*, 382 U.S. at 105.

Similarly, here, no evidence was introduced regarding the effect that merger would have on Louisiana's two state-supported law schools. Not only was there not a full inquiry, there was no inquiry. Indeed, absent any hearing whatsoever, there could have been no findings regarding the effect the law school merger would have had in the effort to desegregate further Louisiana's public institutions of higher education.

Given the importance of legal education to the people of the State of Louisiana and to the students, faculty and staff of the affected institutions, this Court should consider whether this aspect of the trial court's order is procedurally flawed. That question, too, is substantial.

CONCLUSION

Confusion over the legally appropriate racial demographics for predominantly black and predominantly white institutions has been and remains the norm.

In 1978, during the height of the federal Title VI higher education enforcement effort, David A. Tatel, former Director of the Department of Health, Education and Welfare's ("HEW's") Office for Civil Rights, described Title VI compliance as when "*enough* blacks attend[] the white schools and *enough* whites attend[] the black schools . . . ." Tatel, *HEW's Voice in College Crisis*, Virginia-Pilot, Ledger-Star, Dec. 10, 1978, at C1, col. 1 (emphasis added), Appendix at 174a. Since that time, colleges and universities throughout the South have continued to receive similarly insightful direction from HEW's successor, the Department of Education, and from the Department of Justice.[32]

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[32] At trial, Government and Southern University witnesses reasoned the appropriate other-race compositions to be, variously, 25%-30% white in the predominantly black institutions to 25%-30% black in the predominantly white institutions, Deposition of

Confusion over legal standards for Title VI compliance in higher education have plagued the Government, the higher education community and the courts. The major barrier to the establishment of unitary school systems in the South has been the question of how to treat those institutions which were formally all black.[33] Issues of

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Clifton Conrad taken February 6, 1989, Appendix at 155a; 40% white in predominantly black Southern University in New Orleans, Deposition of Robert Gex taken February 16, 1989, Appendix at 161a; 20%-30% white at predominantly black Southern University in Baton Rouge over fifteen to twenty years and minimum 15% black in predominantly white institutions, Deposition of Dr. Dolores Spikes taken February 28, 1989, Appendix at 169a.

The only documented effort by the HEW and Department of Education to spell out the ingredients of compliance was the issuance of criteria to be applied to the formerly *de jure Adams* states. *Revised Criteria Specifying the Ingredients of Acceptable Plans to Desegregate State Systems of Public Higher Education*, 43 Fed. Reg. 6,658 (1978), Joint Appendix at 862; *Amended Criteria Specifying Ingredients of Acceptable Plans to Desegregate State Systems of Public Higher Education*, 42 Fed. Reg. 40,780 (1977), Appendix at 97a. (referred to as "*Criteria*" unless otherwise specified). The soundness of these *Criteria*, however, has not been approved by any court and the regulatory process by which they were developed was flawed. *See* State of Louisiana Opposition to Application for Stay Filed by Southern University and Motion for Stay Filed by Louisiana Attorney General (corrected copy) (Nos. A-126 and A-127) (filed Aug. 14, 1989), Appendix at 49a.

[33] The Government has had its own problems in articulating its intentions toward predominantly black institutions:

> Well, Your Honor, there is no truth to the fact that we are trying to eliminate the black institutions. What we are trying to do is to eliminate the identifiability as black institutions of the black institutions. Your Honor, this is a difficult concept and we acknowledge that it's not an easy concept. . . . It's not an impossible concept though.

Mandel v. U.S. Dep't of Health, Educ. and Welfare, 411 F. Supp. 542, 553 (D. Md. 1976), *aff'd by an equally divided court sub nom. Mayor of Baltimore v. Mathews*, 571 F.2d 1273 (4th Cir. 1977), *cert. denied*, 439 U.S. 862 (1978). This same district court characterized the Government's conduct in its Title VI efforts against Maryland as "outrageous," "unreasonable," "startling," "perplexing," "duplicitous," "arbitrary," "cavalier," "uncooperative," "paradoxical" and "capricious." *Id.* at 548-63.

liability and remedy have been addressed by different courts in decidedly different ways. *See, e.g., Ayers v. Allain*, 674 F. Supp. 1523, 1552-54, 1558 (N.D. Miss. 1987), *appeal docketed*, No. 88-4103 (5th Cir. Feb. 11, 1988) (no liability found despite racial identifiability because racial composition resulted from free and unfettered choice by individual students); *Geier v. Blanton*, 427 F. Supp. 644 (M.D. Tenn. 1977), *aff'd*, 597 F.2d 1056 (6th Cir.), *cert. denied sub nom.* 444 U.S. 886 (1979) (merger of proximately located predominantly black institution and predominantly white institution ordered); *Norris v. State Council of Higher Educ.*, 327 F. Supp. 1368 (E.D. Va.), *aff'd sub nom. Board of Visitors v. Norris*, 404 U.S. 907 (1971) (state enjoined from expanding from two to four years predominantly white institution located in geographic proximity to four-year predominantly black institution); *ASTA v. Alabama Public School and College Auth.*, 289 F. Supp. 784 (M.D. Ala. 1968), *aff'd*, 393 U.S. 400 (1969) (predominantly white institution permitted to establish four-year institution in same community as predominantly black institution).[34]

Much of the confusion over the treatment to be accorded predominantly black colleges and universities stems from *dicta* taken from the early rulings in the so-called *Adams* cases:

> "These Black institutions currently fulfill a crucial need and will continue to play an important role in Black higher education." The process of desegregation must not place a greater burden on Black institutions or Black students' opportunity to receive a quality public higher education.

Adams v. Califano, 430 F. Supp. 118, 120 (D.D.C. 1977) (quoting *Adams v. Richardson*, 480 F.2d 1159, 1165 (D.C. Cir. 1973)). Efforts to accommodate this concept,

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[34] *See also Artis v. Board of Regents*, No. CV 479-251, slip op. at 7 (S.D. Ga. Feb. 2, 1981), Appendix at 195a ("the fact that racial imbalances were originally created or promoted by official acts in the distant past does not mean that the continued existence of such imbalance is attributable to these official acts").

while requiring an undefined mix of white students at predominantly black institutions, have, contrary to the Government's view,[35] turned out to be more than difficult. They have been impossible.

Only this Court is in a position to resolve the question of the appropriate standard by which these efforts are to be judged. The State, Regents, Trustees and LSU urge the Court to assume jurisdiction of this case and order a full examination of the questions presented.

Respectfully submitted,

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[35] *See supra* note 33.

89-771

FILED
NOV 15 1989
JOSEPH F. SPANIOL, JR
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF LOUISIANA, *ex rel.* CHARLES E. "BUDDY" ROEMER, III, GOVERNOR OF THE STATE OF LOUISIANA, BOARD OF REGENTS OF THE STATE OF LOUISIANA, BOARD OF TRUSTEES FOR LOUISIANA STATE COLLEGES AND UNIVERSITIES, AND BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from a Three-Judge United States District Court for the Eastern District of Louisiana

APPENDIX TO JURISDICTIONAL STATEMENT

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300

Section "A"

UNITED STATES OF AMERICA

vs.

STATE OF LOUISIANA, *et al.*

[Filed Dec. 2, 1988]

ORDER OF REFERENCE

It appears to the Court that the question of remedy in this case presents complex issues requiring particular academic and legal expertise, so as to create exceptional circumstances warranting the appointment of a Special Master possessing academic administrative experience.

Pursuant to Rule 53 of the Federal Rules of Civil Procedure, it is hereby ORDERED:

(1) Paul R. Verkuil is hereby appointed to act as special master in this case to review the parties' submissions as to an appropriate remedy in this case and deliver to the panel his findings and recommendation regarding an appropriate remedy which will comply with its order of August 2, 1988, including a plan for adoption by the Court.

(2) In fulfilling these duties, the Special Master shall review the competing proposed plans submitted by the parties and shall fix dates for and conduct hearings regarding the viability of the proposed plans and any other

appropriate remedial measures, according to a schedule to be fixed by him.

He may require the submission of such evidence, in the form of live testimony, affidavits, deposition, or documents, or such additional briefing, as he may deem necessary, subject to such limitations as he may deem appropriate, but consistent with the Federal Rules of Civil Procedure and the Federal Rules of Evidence. He shall be empowered to swear witnesses and may examine any witness himself to elicit any further information he deems necessary. The hearings shall be conducted before a certified court reporter.

The Special Master may fix deadlines for the submission of additional materials to him in preparation for the hearings, and he is empowered to require submission of witness or exhibit lists, supplemental proposals or reports, and/or any other materials pursuant to deadlines to be fixed by him, as necessary for an orderly resolution of the questions before him.

(3) The hearings before him to be conducted on the question of remedy shall, unless extended, be scheduled to take place between January 3, 1989 and shall be concluded by January 27, 1989. The Special Master shall, unless extended, file his report and recommendation with the Clerk of Court by February 1, 1989. The Special Master may, but shall not be required to, submit a draft of his proposal to the parties for their comments prior to filing it with the Clerk of Court.

The Special Master shall forthwith schedule and conduct a status conference, to be attended by trial attorneys only, for the purpose of fixing hearing dates and discussing any questions of procedure as he may deem necessary. The conference shall be fixed by minute entry to be held in the chambers of the Honorable Charles Schwartz, Jr., no later than December 19, 1988.

(4) The Special Master shall keep of a record of the time he expends in connection with this matter and his expenses associated with this case. However, the Court reserves until a later date the question of the rate of compensation and the apportionment of the Master's fees amongst the parties, having satisfied itself that it has discretion to do so. The State of Louisiana shall initially deposit in the Registry of the Court by December 31, 1988, the sum of $20,000.00 towards the Special Master's fees and expenses, along with such additional sums as the Court may deem necessary from time to time and which may be apportioned among any of the parties herein.

(5) The Special Master, with approval of the Court, may employ such staff as is necessary to assist him in performing his duties.

(6) Notwithstanding the above order of reference, the Panel retains the authority to reject or modify any finding or recommendation of the Master regardless of whether any party has filed an objection to the Master's proposals to this Court.

(7) Before entering upon his duties or acting under this Order, the said Master, appointed hereby, shall take and file with the Clerk of this Court, his proper Oath of Office.

New Orleans, Louisiana, this 2nd day of December, 1988.

/s/ John Minor Wisdom
JUDGE JOHN M. WISDOM

/s/ Charles Schwartz, Jr.
JUDGE CHARLES SCHWARTZ, JR.

/s/ Veronica D. Wicker
JUDGE VERONICA D. WICKER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300

Section "A"

UNITED STATES OF AMERICA

Versus

STATE OF LOUISIANA

MASTER'S OATH

I, PAUL R. VERKUIL, Special Master in the above-entitled action, do solemnly swear that I will faithfully and impartially discharge and perform all the duties devolved on me as such special master, according to the best of my ability and understanding.

/s/ Paul R. Verkuil
MASTER

Subscribed and sworn to me, this 2nd day of December, 1988.

/s/ Charles Schwartz, Jr.
U.S. District Judge

MINUTE ENTRY
MARCH 30, 1988
WISDOM, J.
SCHWARTZ, J.
WICKER, J.

Civil Action No. 80-3300

Section "A"

UNITED STATES OF LOUISIANA

vs.

STATE OF LOUISIANA, *et al.*

[Filed Mar. 31, 1988]

In light of the status conference held March 29, 1988 it is ORDERED:

The litigation schedule proposed in the parties' "Response to the Court's January 22, 1988 Order" is hereby adopted as the governing pre-trial schedule and may not be altered except by leave of Court for good cause shown.

All motions for summary judgment shall be filed on or before May 3, 1988. The motions shall be submitted in strict compliance with Local Rule 3.9.

All oppositions to motions for summary judgment shall be filed on or before May 24, 1988. Each opposition shall be accompanied by an item by item response to the movant's Local Rule 3.9 statement and shall in addition be accompanied by the Local Rule 3.10 statement, setting forth the opposition's contentions of fact.

By noon, May 31, 1988, each movant shall submit directly to chambers an item by item response to the facts

set forth in each statement under Local Rule 3.10. In preparing both this submission and the response to the Local Rule 3.9 statement, the parties shall consider what facts they will admit for the purpose of consideration of the motion and shall further consider admission of any factual allegations proposed by an opponent that are not material to the motion.

The parties shall submit an original and three copies for any motion papers filed.

All motions for summary judgment shall be heard on Wednesday, June 1, 1988, at 2:00 p.m., in the Courtroom of the Honorable Charles Schwartz, Jr. Following the motion hearing, a status conference will be held in chambers to discuss, among other things, the progress of the case to date and the format for presentation of evidence at trial.

MINUTE ENTRY
October 7, 1988
WISDOM, J.
SCHWARTZ, J.
WICKER, J.

Civil Action No. 80-3300

Section "A"

UNITED STATES OF AMERICA

versus

STATE OF LOUISIANA, *et al.*

[Filed Oct. 7, 1988]

This matter is scheduled to come before the Court for a status conference to be held on Tuesday, November 22, 1988 at 1:00 p.m., at which time the parties have been ordered to be prepared to advise the Court of what progress has been made in confecting an appropriate remedial plan. In furtherance of this objective, the Court hereby sets forth the following agenda of matters to be discussed:

1) Any remedial plans the parties intend to submit;

2) What further action the State is prepared to take to confect and institute any such remedial plans; and

3) The names and qualifications, including both academic background and administrative experience, of proposed special masters who may be called upon to review any proposed remedial plans, the testimony regarding appropriate remedial measures, and/or submit his or her own remedial plan, reserving to the Court the right to decline to appoint all persons whose names are submitted and to make its own selection.

On or before Monday, November 14, 1988, each party shall submit in quadruplicate copies of any proposed remedial plans and memorandum of his, her or its position regarding the matters on the above agenda.

MINUTE ENTRY
PAUL R. VERKUIL, SPECIAL MASTER
DECEMBER 16, 1988

Civil Action No. 80-3300

Section "A"

UNITED STATES OF AMERICA

Versus

STATE OF LOUISIANA

---

1. Any amendments to proposed remedial plans and any new proposed remedial plans shall be filed with the Special Master and served on all attorneys of record no later than January 20, 1989.

2. A status conference with attorneys only will be held on January 25, 1989 at 2:00 p.m.

3. Written reports of all witnesses in support of or in opposition to any proposed plan shall be obtained as soon as possible and a copy served on all counsel no later than February 1, 1989.

4. Any expert opinion at any hearing on remedy (regardless of what he or she may testify at any deposition) shall be limited to what is set forth in his or her report and said report shall constitute his or her direct testimony at any hearing.

5. No expert opinion shall be received or considered unless within 15 days after it has been submitted (in draft or final form) to counsel who employed him or her, such expert shall make himself or herself available for deposition in New Orleans, Louisiana.

6. The Special Master reserves the right to designate independent expert(s) of his own choosing.

7. Discovery as to all experts shall be completed no later than February 22, 1989.

8. Discovery as to any matters other than expert opinions shall be completed no later than February 22, 1989.

9. On or before February 15, 1989, the parties shall file in the record and serve upon all counsel of record a list of all witnesses who may be called to testify at any hearing along with a brief description of the general subject matter of their testimony. Except for good cause shown, the Special Master will not permit any witness (expert or fact) to testify unless with respect to such there has been complete compliance with these orders.

10. A status conference will be held on March 1, 1989 at 9:00 a.m. to determine the scope of the hearings the Special Master expects to conduct. Any pretrial memoranda will also be submitted by this date.

11. A hearing will be held on the proposed remedial plan beginning March 7, 1989 at 9:00 a.m. at Room 300 of the Fifth Circuit Court of Appeals.

12. The Special Master will ask the Court to continue the trial of remedy presently fixed for February 15, 1989 to another date.

MINUTE ENTRY
APRIL 18, 1989
PAUL R. VERKUIL

Civil Action No. 80-3300

Section "A"

UNITED STATES OF AMERICA

vs.

STATE OF LOUISIANA, *et al.*

[Filed Apr. 18, 1989]

---

1. The Recommended Remedial Plan in this matter was filed with the Court and served on the counsel to the parties on April 18, 1989.

2. According to prior agreement, counsel for the parties have the opportunity to submit amendments to the recommended remedial plan. These amendments should focus on corrections and additions to the plan. Arguments already made with pre and post hearing memoranda need not be repeated.

3. Written amendments should be filed with the Court and served on the Master by May 2, 1989.

4. Oral argument on the amendments is set for May 9, 1989, at 8 a.m. in Room 223, U.S. Court of Appeals for the Fifth Circuit. Counsel for the State defendants may have one hour, divided no more than four ways. Counsel for the United States may have 40 minutes;

counsel for Southern University may have 20 minutes; and counsel for Grambling 5 minutes.

5. If counsel have any questions or suggested changes to this schedule, they may contact Max Nathan, Esq. who will arrange a telephone conference with the Special Master, if necessary.

So ordered,

/s/ P. R. V.
PAUL R. VERKUIL
Special Master

Date of Entry Apr. 18, 1989

No. ———

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1989

SOUTHERN UNIVERSITY BOARD OF SUPERVISORS,
Applicant,

v.

UNITED STATES OF AMERICA,
Respondent.

On Application to Stay Mandate of the
United States District Court
for the Eastern District of Louisiana
Pending Appeal

STATE OF LOUISIANA OPPOSITION TO APPLICATION FOR STAY FILED BY SOUTHERN UNIVERSITY AND MOTION FOR STAY FILED BY LOUISIANA ATTORNEY GENERAL

CORRECTED COPY

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IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1989

No. ———

SOUTHERN UNIVERSITY BOARD OF SUPERVISORS,
Applicant,

v.

UNITED STATES OF AMERICA,
Respondent.

On Application to Stay Mandate of the
United States District Court
for the Eastern District of Louisiana
Pending Appeal

STATE OF LOUISIANA OPPOSITION TO APPLICATION FOR STAY FILED BY SOUTHERN UNIVERSITY AND MOTION FOR STAY FILED BY LOUISIANA ATTORNEY GENERAL

To the Honorable Byron R. White, Associate Justice of the United States and Circuit Justice of the United States Court of Appeals for the Fifth Circuit:

I. STATEMENT OF THE CASE

This litigation was originally brought by the United States ("Government") in 1974 alleging that the State of Louisiana ("State"), and the boards and agencies which then had responsibility for public higher education in Louisiana (collectively with the State, "Defend-

ants"), violated Title VI of the Civil Rights Act of 1964, §§ 601 and 602, as amended, 42 U.S.C.A. §§ 2000d, 2000d-1 (1982 & Supp. 1989) (hereinafter referred to as "Title VI") and the equal protection clause of the fourteenth amendment to the United States Constitution. Attorney General's Motion For Stay Addressed to Individual Justice ("AGM") Attachment 7, Complaint, filed March 14, 1974, No. 74-68 "Complaint"). On March 28, 1974, a three-judge court was convened to hear the case.[1]

The current four boards which direct public higher education for Louisiana are the Board of Regents ("Regents"), which has responsibility for the coordination of academic program development and the presentation to the State Legislature of a unified budget; the Board of Trustees for State Colleges and Universities ("Trustees"), which has management responsibility for nine institutions of higher education, eight of which are predominantly white and one of which, Grambling State University ("Grambling") is predominantly black, in their respective student body compositions; the Board of Supervisors of Southern University and Agricultural and Mechanical College ("Southern"), which is a system, consisting of three institutions, the student body composition of which is predominantly black; and the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College ("LSU"), a system consisting of seven institutions, the student body composition of which is predominantly white.

The Government based its claims of liability on allegations that vestiges of the *de jure* era continue to exist in public higher education if Louisiana. AGM Attachment 7, Complaint at 8-13, paras. 20 *et seq.* The primary focus of the Government's allegations was the continued existence of predominantly black institutions ("PBIs"), which

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[1] The current three-judge court consists of Circuit Judge John Minor Wisdom and District Judges Charles Schwartz, Jr. and Veronica D. Wicker.

remain overwhelmingly black, and of predominantly white institutions ("PWIs"), which are more desegregated, but still heavily white, in their respective student body compositions. *See id.* The Government also pointed to the racial makeup of the management boards, faculty and staff and alleged deficiencies in the PBI facilities and academic program offerings, as vestiges of *de jure* segregation. *See id.* at 13, para. 27.

On September 8, 1981, after a number of years in which this case languished for lack of prosecution, to be revived in the late 1970's, the Government and Defendants entered into a Consent Decree on September 8, 1981, ("Consent Decree"), Southern's Application To Stay Mandate of a Three Judge District Court of the Eastern District of Louisiana Pending Appeal filed August 10, 1989 ("SA"), Attachment 1, which required State expenditures of significant enhancement dollars at Southern and Grambling,[2] *id.* at 17-28, intense efforts at "other-

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[2] Indeed, the State spent well over $100 million in supplemental, non-formula funds at the PBIs pursuant to the Consent Decree. *United States v. Louisiana*, 692 F. Supp. 642, 658 (E.D. La. 1988).

Regarding the issue of supplemental enhancement monies for the PBIs' two additional points need to be made. First, Louisiana's economy is in a depression due to the sharp drop in oil and gas prices. Louisiana has the highest unemployment rate in the nation at 9.5 percent. As a result, State finances are fragile. Recently-elected Governor Charles E. "Buddy" Roemer, III did balance the State's budget for the first time in five years in his first year in office but the Governor's plan for long term economic revitalization and fiscal reform was defeated by the voters on April 29, 1989 by a vote of 45 percent to 55 percent. So, while short term State finances are adequate (for now), long term needs are still unsettled.

Second, these financial circumstances do not mean that the State or its Governor is not willing to spend additional monies on public higher education in Louisiana, including at the State PBIs. On the contrary, Governor Roemer was elected as a reform candidate with education as his primary focus. Despite the fact that the district court ruled in 1988 that the Consent Decree was inoperative and even though the State faced then and still faces difficult times economically, Governor Roemer included $12 million in additional

race" recruitment by all the institutions in the areas of students, faculty and staff, *id.* at 3-17, and increased racial diversity on the four boards, *id.* at 3.

On August 2, 1988, the trial court ruled that the Consent Decree had failed to disestablish the vestiges of segregation in Louisiana public higher education and that reliance primarily upon enhancement of the PBIs as a desegregation tool was inherently flawed and misplaced. *United States v. Louisiana*, 692 F. Supp. 642, 658 (E.D. La. 1988). The court later instructed the parties to attempt to develop a joint plan for desegregation consistent with the reasoning of the *Louisiana* decision.

On December 2, 1988, after the parties' failure to reach agreement on a joint plan, the trial court appointed Dr. Paul R. Verkuil, former Dean of Tulane University Law School and current President of William & Mary College, as Special Master to hear the remedy phase of the case. State Attachment 1, Order of Reference (December 2, 1988).

The case was heard before Dr. Verkuil, who filed a Recommended Remedial Plan on April 18, 1989. The opportunity was provided to the parties to register objections to the proposed plan, State Attachment 2, Minute Entry (April 19, 1989), and on May 30, 1989, Dr. Verkuil filed his Final Report and Proposed Order (May 30, 1989) ("Final Report") with the trial court. AGM Attachment 5, SA Attachment 7, Final Report.

The trial court permitted objections to be made to the Final Report, oral argument was heard and, on July 19, 1989, the court issued its Opinion and Order (July 19, 1989) ("Remedial Order"). AGM Attachment 2, SA

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enhancement monies for Southern and Grambling in the State's 1989-90 fiscal year budget plus substantial monies for additional capital outlay projects of the schools. Governor Roemer has also appointed the most minorities to his cabinet of any twentieth century Louisiana governor.

Attachment 8, Remedial Order. Subsequently, the Government, Southern and the Grambling Alumni Association ("Grambling Alumni")[3] filed various motions to alter or amend the judgment which were granted in part and denied in part. AGM Attachment 3, SA Attachment 10, Supplemental Order (August 4, 1989) ("Supplemental Order"); AGM Attachment 6, SA Attachment 10, Reasons for Ruling (August 4, 1989) ("Supplemental Reasons").

Southern and the Grambling Alumni also sought stays of the execution of judgment from the trial court and these were denied simultaneously with the ruling on the various motions to alter or amend judgment. AGM Attachment 1, SA Attachment 10, Order and Reasons (August 4, 1989) ("Order and Reasons"). Additionally, in a curious procedural move, the Louisiana Attorney General, who had previously taken no position in the remedial phase of this litigation, joined with Southern in seeking a stay.[4] *Id.* at 1.

In almost all significant respects, the three-judge court adopted the remedial recommendations of the special master and ordered, among other things:

1. Disestablishment of the multi-board governance system (AGM Attachment 2, SA Attachment 8, Remedial Order at 29);

2. Creation of a single higher education governance structure with full governance authority, including the authority to develop and eliminate academic programs, hire and fire administrators, present a unified higher ed-

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[3] The trial court also determined that the Grambling Alumni, as *amicus*, had no standing to pursue post-trial relief. AGM Attachment 6, SA Attachment 10, Reasons for Ruling (August 4, 1989) ("Supplemental Reasons") at 2.

[4] Indeed, the Louisiana Attorney General has filed no substantive pleadings in the remedial phase of this case. *See* discussion of Louisiana Attorney General's role, *infra*, at 6.

ucation system budget to the State Legislature (*id.* at 29 *et seq.*), and to enforce the desegregation plan (*id.* at 17);

3. Appointment of seventeen members to the single board plus one non-voting student member, to be appointed by the Governor and confirmed by the Louisiana Senate, and the majority of whom are to be selected from the existing boards (Regents, three; Trustees, two; Southern, two; and LSU, two) (*id.* at 30);

4. Creation of a community college system with responsibility for remedial education and strong articulation with the four-year institutions (*id.* at 37-39);

5. Merger over five years of the Southern University Law Center and Paul M. Hebert (LSU) Law Center (*id.* at 40-41)[5];

6. Elimination of educationally unnecessary academic program duplication among and between predominantly white and predominantly black institutions (*id.* at 39-40);

7. Appointment of a system President and a Vice President for Desegregation (*id.* at 31-32);

8. Needed programmatic and facility enhancement of predominantly black institutions (*id.* at 41);

9. Intensive efforts at recruitment and retention of other-race students, faculty and staff for each of the institutions (*id.* at 42-43; AGM Attachment 3, SA Attachment 10, Supplemental Order at 1-3);

10. Establishment of non-racial institutional missions, *id.* at 33-35, and selective admission standards in five of the State's 14 institutions (AGM Attachment 2, SA Attachment 8, Remedial Order at 35-37); and

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[5] Although adverting to possible future mergers, this element of the remedy was not specifically proposed by the special master. AGM Attachment 5, SA Attachment 7, Final Report at 35-38.

11. Creation of a three-member monitoring committee to assist the court and the parties in implementing the trial court's orders (*id.* at 43-45).

II. ARGUMENT

A. The State and Three of the Four Governing Boards Supported the Consolidation of Governance into a Single Board

The most significant remedy ordered by the three-judge district court was the consolidation of public higher education governance into a single governing board. With the solitary exception of Southern, the four boards currently responsible for governance support consolidation:

> The state defendants including the Governor, the LSU System, the Board of Trustees and the Board of Regents all favor this concept even though it will result in a reduction or elimination of authority currently enjoyed by some of them. . . .
>
> On the other side of the single board question lies one of the defendants, Southern University Board of Supervisors.

AGM Attachment 5, SA Attachment 7, Final Report at 42.

The Government remains neutral on the question of single-board versus multi-board governance, State Attachment 3, United States' Objections to the Special Master's Final Report and Order, Issued on May 16, 1989 (May 26, 1989), at 11, while the Louisiana Attorney General was silent, taking no prejudgment position on any remedial issue, including governance. The current position of the Attorney General, and how he came to present it, deserves threshold treatment in this case.

B. The Position of the Louisiana Attorney General Should Be Given No Consideration

The State opposes the Louisiana Attorney General's post-judgment entry into this case under the guise of seeking "to provide a defense on behalf of the people of the State of Louisiana. . . ." State Attachment 4, Motion to Withdraw "Notice to Join in Motion of the Southern University Board of Supervisors for a New Trial And/Or Motion to Alter or Amend Judgment" and Motion to Enroll Counsel of Record (August 3, 1989) ("Attorney General's Motion to Withdraw Notice") at 1.

The Attorney General has been a complete non-participant in the remedial phase of this litigation and filed no substantive motions or memoranda prior to the trial court's Remedial Order.

Apparently recognizing the inevitable conflicts of interest among the various defendants to this litigation, the Attorney General earlier authorized the separate boards of governance to retain private counsel to represent the boards' respective positions. *Id.*, Attachment "A" at 2. Additionally, at the outset of the remedy phase of this case, the Attorney General moved for the enrollment of additional counsel from the Governor's office to represent the State of Louisiana, State Attachment 5, Motion to Enroll Additional Counsel of Record (January 18, 1989), a motion which was granted by the trial court on January 20, 1989. State Attachment 5.[6]

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[6] The trial court ordered John N. Kennedy, Joseph J. Levin, Jr. and Carla Calobrisi "enrolled as additional counsel of record for the State of Louisiana," and designated John N. Kennedy as trial attorney and Winston G. DeCuir, of the Attorney General's office as "local" attorney. Neither Mr. DeCuir nor any employee of the Attorney General has since played any role in this case until after the Remedial Order. Mr. Kennedy is employed in the Governor's office as Special Counsel to the Governor and Mr. Levin and Ms. Calobrisi are employed by the Governor as outside counsel to represent the State and the Governor in this litigation.

Subsequently, on August 2, 1989, the Attorney General filed a document entitled, Notice to Join In Motion of the Southern University Board of Supervisors for a New Trial And/Or Motion to Alter or Amend Judgment (August 2, 1989) ("Attorney General's Notice"), State Attachment 6, by which he sought to:

> hereby designate one said counsel, that of the *Southern University Board of Supervisors*, to represent the *particular interests of the Attorney General* in defending the constitutionality of the state's constitutional provisions declared unconstitutional by the Court's Order of July 19, 1989 and which finding is objected to in the motion in which the Attorney General now joins.

Id. at 2 (emphasis added).[7]

Apparently reconsidering the conflict of interest presented by this extraordinary appointment, the Attorney General sought permission of the trial court the next day to withdraw that notice and, instead, add three new lawyers to protect his "particular interest[]." State Attachment 8, Attorney General's Motion to Withdraw Notice,

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[7] Following the Attorney General's "entry" into this case, the trial court recognized that the State in this case "[was] act[ing] through the Governor." AGM Attachment 6, SA Attachment 10, Supplemental Reasons at 1, n.2; *see also* AGM Attachment 1, SA Attachment 10, supplemental Order and Reasons at 1 ("The State Attorney General joined in Southern's motion, but the State acting through the Governor opposes it"). Moreover, with or without the Attorney General's approval, the Governor can appoint special counsel to preserve and protect the rights of the citizens of Louisiana. State Attachment 7, La. Rev. Stat. Ann. §§ 49:21 & 22 (West 1987); *see also State v. Dubuelet*, 25 La. Ann. 160 (1873) (Governor has right to appeal judgment even though the Attorney General has already filed an appeal). The lawyer representing Southern is Senator William J. Jefferson, the person selected by the Attorney General to represent his particular interests, and former Chairman of the Legislative Black Caucus of the Louisiana Legislature.

Attachment "A" at 2. Permission was granted that same day. State Attachment 9, Order (August 3, 1989).

Some have suggested that the Attorney General's particular interest here is primarily political.[8] The State does not care to speculate about the Attorney General's motivations, political or otherwise; however, one consequence of his action is certain, and must have been known by all involved: by joining with Southern and belatedly entering the remedial phase of this case for the first time through a post-judgment motion for stay before the district court, Southern was able through its "partner," the Attorney General, to have someone other than Southern contest liability before the district court, thus arguably increasing Southern's chances for a stay, while avoiding the consequences to Southern of such a claim. Without liability, there may be no enhancement funding for Southern.[9]

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[8] Some observers hold the view that the Attorney General's sudden appearance has less to do with his "duty" to protect the State constitution than with the courting of votes. *See* State Attachment 10, Alexandria Daily Town Talk, Aug. 9, 1989, at——, col. 1; State-Times, Aug. 7, 1989, at 6-B, Col. 1; Sunday Advocate, Aug. 6, 1989, at 10B, Col. 1.

[9] Throughout this case, it has been the position of Southern that the State had indeed violated the proscriptions of Title VI. *See* State Attachment 11, Southern Board of Supervisors Memorandum in Opposition to Defendant Board of Regents' Motion for Certificate of Appeal, Pursuant to 28 U.S.C. § 1292(b) at 2 (August 24, 1988). Premised upon its view that such a violation continued, Southern argued for significant enhancement of its institutions. *See, e.g.*, State Attachment 12, Response of Southern Board of Supervisors to the Final Report of the Special Master at 6-11 (June 12, 1989). In its Motion for Stay filed before the three-judge court, Southern, while alluding to the uncertainty of the law regarding Title VI liability in higher education, did not specifically retract its previous position in support of liability. As the trial court commented:

> [T]he Panel does not read Southern's motion as challenging the Court's conclusion that the Louisiana system of higher

Whatever the reason and the motivation, it is surely remarkable that the Attorney General now seeks a stay pending his appeal, alleging that the State will suffer irreparable harm if the stay is not granted. The State, for the most part, supports the Remedial Order. The Attorney General has always been aware of the State's position, as well as that of Trustees, Regents, and LSU, supporting consolidation of the governance system.[10] He cannot now be heard to complain that the ordered restructure causes irreparable harm to the State. In fact, this Court need not consider whether the Attorney General has shown a likelihood to succeed on the merits of his appeal, because, absent a showing of irreparable harm, a stay will not be granted.[11]

In a similarly postured case, this Court denied an application for stay filed by the attorney general of Alabama and, as here, opposed by the governor of that state. In *Graddick v. Newman*, 453 U.S. 928 (1981), the Alabama attorney general sought to stay a district court or-

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education violates the Federal Constitution. Rather, Southern challenges the scope of remedial relief ordered by the Court AGM Attachment 6, SA Attachment 10, Supplemental Reasons at 2, n.4.

Now, however, before this Court, Southern appears to bite the bullet, reverse its position and appeal liability. SA at 1.

[10] Indeed, the Attorney General was served with a copy of the May 30, 1989, Final Report, which clearly identified the defendants' position on governance. *See* AGM Attachment 5, SA Attachment 7, Final Report at 42 (state defendants with the exception of Southern favor creation of a single board). Moreover, the State's position on remedy, as expressed through the Governor, received widespread and intense publicity.

[11] *See Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1317 (Blackmun, Circuit Justice 1983) (citing *Whalen v. Roe*, 423 U.S. 1313 (Marshall, Circuit Justice 1975) for the proposition: The Court need not consider the likelihood of success "if the applicant fails to show irreparable injury from the denial of the stay"). *See* discussion, *infra*, at 30-33.

der requiring the release of approximately 400 state prison inmates prior to the expiration of their sentences, as part of the remedy for the state's long-litigated failure to operate its prison system in compliance with constitutional standards. The state attorney general had never actively participated in the litigation and had not appeared as a party at all for four years. 453 U.S. at 929, 931. During this period, Alabama's primary representative in the litigation had been Governor Fob James. *Id.* The governor, arguing that he, not the attorney general, properly represented Alabama's interests, opposed the attorney general's application for stay. *Id.* at 934.

The Court denied the application for stay, holding that the attorney general had failed to show either a threat of irreparable injury or that a balancing of equities required the granting of a stay. *Id.* at 933-37. In reaching this decision, the Court relied heavily on the fact of the governor's opposition to the application, stating that the "views of the Governor . . . remain entitled to great weight in assessing the compelling risks of irreparable injury." *Id.* at 934-36. The Court noted that the attorney general had moved to participate in the case with "unexplained tardiness" and expressed reluctance to stay an order issued by a court with a decade's experience with the litigation. *Id.*

The instant case is virtually indistinguishable from *Newman*. Governor Roemer has actively participated in the litigation as the representative of the State of Louisiana and all of its citizens, both black and white, while the Attorney General has been noticeably absent from the proceedings. The Governor contends that no irreparable harm will result to Louisiana or its residents if the stay is not granted. Furthermore, the balancing of the equities requires that the district court's remedy, as the culmination of over fifteen years of litigation, be implemented without unnecessary delay.

The Louisiana Attorney General should not be permitted to use this Court in an unseemly fashion which disserves the citizens of Louisiana.

C. The Remedial Issues Presented by Southern and the Louisiana Attorney General Are Not Sufficiently Meritorious to Note Probable Jurisdiction and Reverse the Lower Court's Remedial Mandate

The State, through its Governor, Charles E. "Buddy" Roemer, III, is in the seemingly anomalous position of disagreeing with the trial court's finding of liability, while being in almost total agreement with the Remedial Order. Indeed, except for the trial court's order requiring merger of the Southern and LSU Law Centers,[12] the State believes that the remedies ordered are critical for the future of public higher education in Louisiana and, assuming liability, are wholly compatible with the scope of the trial court's equitable authority. The State, therefore, opposes a stay of the Remedial Order.

In considering whether to grant an application or a motion for a stay pending the appeal of the Remedial Order, the Court should consider the following factors:[13]

(1) Whether the Court considers the issues presented by the Applicants sufficiently meritorious to note probable jurisdiction;

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[12] The State questioned the merger order principally because that result was not sought by any of the parties, no evidence was marshalled on the specific merger contemplated under the Remedial Order, and the issue was not briefed at all prior to the court's issuance of that order. And, in any event, the State and the Governor have consistently opposed the merger of Louisiana schools at any level. AGM Attachment 5, SA Attachment 7, Final Report at 35.

[13] *See Rostker v. Goldberg*, 448 U.S. 1306, 1308 (Brennan, Circuit Justice 1980) (Justice Brennan set forth the four-part showing necessary for the Court to consider in granting an application for a stay).

(2) Whether the Court is likely to conclude that the district court's decisions were erroneous and therefore reverse the district court's mandate;

(3) Whether the Applicants will suffer irreparable harm if the stay is not granted; and

(4) In a close case, whether a balance of the equities favors the Applicants.

Because the district court has denied Southern's motion for a stay, in which the Louisiana Attorney General joined, AGM Attachment 1, SA Attachment 10, Order and Reasons, Southern and the Louisiana Attorney General must sustain a heavy burden to rebut the presumption, first, that the district court mandated a correct remedy and, second, that the district court's denial of the stay was correct.[14] The State contends that Southern and the Attorney General have failed to rebut this presumption, and in consideration of the four factors, the State respectfully requests the Court to deny any application for a stay.

It is significant that the district court denied Southern's motion [15] for a stay of execution of judgment pending appeal. *Id.* The criteria imposed by the district court in denying the motion are similar to the factors this Court will consider in determining whether to deny this application.[16] The district court denied Southern's mo-

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[14] *See Whalen v. Roe*, 423 U.S. at 1316.

[15] As previously noted, the Attorney General joined in Southern's motion for stay before the trial court.

[16] *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981) sets forth the criteria which must be satisfied by the movant for a stay to be granted: "(1) whether the movant has made a showing of likelihood of success on the merits, (2) whether the movant has made a showing of irreparable injury if the stay is not granted, (3) whether the granting of the stay would substantially harm the other parties, and (4) whether the granting of a stay would serve the public interest."

tions because, in its challenges of the formation of a single governing board, Southern failed to make a showing of likelihood of success on the merits. The court stated:

> We observe, however, that the segregation maintained by the four board system is incompatible with any suggestion that the four board system retains viability. For this and other reasons, the Panel is of the opinion that Southern has shown little likelihood it will prevail on the merits of this aspect of Southern's appeal, and thus, no stay is warranted on this ground.

Id. at 2. As the Court will recall, *see* discussion, *supra*, at 2, the Southern board manages a predominantly black system of higher education and the other management boards govern predominantly white systems.

Great deference should be accorded the district court's denial of Southern's motion. The record in this case is replete with evidence supporting the Remedial Order. *See, e.g.*, AGM Attachment 5, SA Attachment 7, Final Report. The issues presented in the instant case received careful attention by the three-judge court for a period of fifteen years [17] and intense scrutiny by the special master. Substantial case law also supports the trial court's decision. For example, in *Graves v. Barnes*, 405 U.S. 1201 (Powell, Circuit Justice 1972), an apportionment case, a three-judge district court determined that county multimember district plans were unconstitutional and that a residential requirement should be abated for the upcoming election. *Id.* at 1202. Justice Powell, with careful attention to the trial court's holding below, determined that the order was sufficiently narrow to address the issues. He also noted the importance of the trial court's denial of the applicant's motion for a stay. Justice Powell stated:

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[17] AGM Attachment 1, SA Attachment 10, Order and Reasons at 2.

> Of equal importance in cases presented on direct appeal—where we lack the discretionary power to refuse to decide on the merits—is the related question whether five justices are likely to conclude that the case was eroneously decided below. Justices have also weighed heavily the fact that the lower court refused to stay its order pending appeal, indicating that it was not sufficiently persuaded of the existence of potentially irreparable harm as a result of enforcement of its judgment in the interim.

Id. at 1203-04. As in *Graves*, the three-judge court in the instant case was not persuaded by the Applicants.

In addition to respecting trial courts' denials of stay, the Court has held that absent a change in circumstances or the occurrence of an extraordinary event, an application for a stay should not be granted, especially when a desegregation plan is at issue.[18]

This Court has, on many occasions, considered applications for stays of desegregation plans. In *Guey Heung Lee v. Johnson*, 404 U.S. 1215 (Douglas, Circuit Justice 1971), the applicant filed applications for stay of judgment in both the district court and the Ninth Circuit and was unsuccessful. In reviewing the application to the Supreme Court, Justice Douglas remarked that the district court order providing a desegregation plan for the public schools in San Francisco had the "earmarks of a thoughtful plan." *Id.* at 1217. Above all else, the Remedial Order and Supplemental Order of the three-judge court, in this case, were thoughtful.

In a similar case, *Dandridge v. Jefferson Parish School Bd.*, 404 U.S. 1219 (Marshall, Circuit Justice 1971), where a plan to desegregate public education in Louisiana was at issue, Justice Marshall denied an application for a stay following the denials by the district court and the

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[18] *See Dandridge v. Jefferson Parish School Bd.*, 404 U.S. 1219 (Marshall, Circuit Justice 1971).

Fifth Circuit. In *Dandridge*, Justice Marshall concluded there was no unique circumstance in the case which warranted a stay. Much like the instant case, the litigation in *Dandridge* had been pending for many years.

The trial court here was equally concerned by what it viewed as a meritless attempt by Southern and the Louisiana Attorney General to delay further desegregation and quality education in Louisiana by filing their motions for a stay:

> *Brown* was decided thirty-five years ago. It is high time that higher education in Louisiana be reworked at all levels in a unified effort to improve the education offered in this state to all Louisiana citizens. This Court will not countenance any delay in the effectuation of the tailored remedies it perceives to be mandated by the federal Constitution and the State's best interests.

AGM Attachment 1, Attachment 10, Order and Reasons at 2-3.

The trial court's mandate should be reversed only if there is an abuse of discretion, and the Remedial Order does not constitute an abuse of discretion. The remedy ordered by the trial court is, for the cost part, appropriate for the violation the three-judge court found to exist. The State, as previously indicated, denies liability. Given that liability was found, however, the district court's remedy is, in the State's opinion, the one most likely to be successful, particularly given the alternatives offered by the Government and Southern in the court below. As the trial court stated:

> This case has been pending before this Panel for over 15 years. Following the utter failure of the consent decree, the Court undertook to tailor a remedy that would undo the segregation existing at all levels of the State's higher education system.

Id. at 2.

In *Keyes v. School District No. 1*, 396 U.S. 1215 (Brennan, Circuit Justice 1969), Justice Brennan vacated an order of the Tenth Circuit granting a stay of a school desegregation plan. Justice Brennan determined that the stay should be vacated because the desegregation plan ordered by the district court did not constitute an abuse of discretion, the correct standard of review.[19] *Id.* at 1216.

Southern and the Louisiana Attorney General contend that the remedy ordering the creation of a single governing board imposed by the trial court is likely to be reversed since it restructures Louisiana's higher education system. SA at 17, AGM at 11. The trial court, it must be remembered, held that the State and the entire system of higher education in Louisiana violated Title VI by maintaining racially identifiable institutions and racially identifiable governing boards. As the trial court recognized in the Remedial Order,

> Given the racially identifiable membership of the Boards, none, including the Southern board which vigorously seeks to preserve its separate identity, is an exponent of racial integration. Retaining such vestiges of segregation is not an appropriate solution to the problems before this Court, and it can never be forgotten that this case is about the integration of all of Louisiana's institutions of higher education. . . .
>
> . . . The present scheme for governing education in Louisiana—three operating boards and one coordinating board—has perpetuated illegal segregation in Louisiana's higher education. . . . The system of multiple boards is therefore a defect in the state's system of higher education that violates the federal constitution.

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[19] *See also Commodity Futures Trading Comm'n v. British Am. Commodity Options Corp.*, 434 U.S. 1316, 1319 (Marshall, Circuit Justice 1977).

AGM Attachment 2, SA Attachment 8, Remedial Order at 6-7. Where the court has found that there exists a system-wide violation, a system-wide remedy is appropriate and, in the instant case, the trial court unquestionably had the authority to alter the governance structure of higher education in Louisiana. *See Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 420 (1977); *Keyes v. School District No. 1*, 413 U.S. 189, 213, *reh'g denied*, 414 U.S. 883 (1973).

This is so because a district court must be guided by equitable principles in formulating a remedial desegregation order. *Milliken v. Bradley*, 433 U.S. 267, 279-80 (1977) (citing *Brown v. Bd. of Educ.*, 349 U.S. 294, 300 (1955)). Once a constitutional violation has been found, "the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann v. Charlotte-Mecklenberg Bd. of Educ.*, 402 U.S. 1, 15, *reh'g denied*, 403 U.S. 912 (1971).

These powers have been used extensively by district courts in recent decades to formulate appropriate remedies for constitutional violations in the area of school and university desegregation.[20]

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[20] *See, e.g., Green v. County School Bd.*, 391 U.S. 430 (1968); *Little Rock School Dist. v. Pulaski County Special School Dist.*, 778 F.2d 404 (5th Cir. 1985), *cert. denied*, 476 U.S. 1186 (1986); *Liddell v. Missouri*, 731 F.2d 1294 (8th Cir.) *cert. denied sub nom. Leggett v. Lindell*, 469 U.S. 816 (1984); *Hoots v. Pennsylvania*, 672 F.2d 1107 (3rd Cir.), *cert. denied*, 459 U.S. 824 (1982); *Morrilton School Dist. No. 32 v. United States*, 606 F.2d 222 (8th Cir. 1979), *cert. denied*, 444 U.S. 1071 (1980); *Newburg Area Council v. Bd. of Educ.*, 510 F.2d 1358 (6th Cir. 1974), *cert. denied sub nom. Bd. of Educ. v. Haycraft*, 421 U.S. 931 (1975); *Haney v. County Bd. of Educ.*, 429 F.2d 364 (8th Cir. 1970); *Evans v. Buchanan*, 447 F.Supp. 982 (D. Del.), *aff'd*, 582 F.2d 750 (3rd Cir. 1978), *cert. denied sub nom. Delaware State Bd. of Educ. v. Evans*, 446 U.S. 923, *reh'g denied* 447 U.S. 916 (1980); *Geier v. Blanton*, 427 F.Supp. 644 (M.D. Tenn. 1977), *aff'd sub nom. Geier v. Uni-*

District courts have ordered the creation or consolidation of new school boards.[21] In some cases, they have appointed receivers to administer local schools temporarily where local educational authorities have failed to make sufficient progress toward desegregation. *See Morgan v. McDonough*, 540 F.2d 527 (1st Cir. 1976), *cert. denied*, 429 U.S. 1042 (1977); *Turner v. Goolsby*, 255 F. Supp. 724 (S.D. Ga. 1965).[22]

Once liability has been found, a district court also has the responsibility to develop a remedy that, above all, will be effective. *Swann*, 402 U.S. at 25; *Davis v. Board of School Comm'rs*, 402 U.S. 33, 37 (1971); *Green v. County School Bd.*, 391 U.S. at 438-439. The evidence on the record in the instant case establishes, beyond question, that the establishment of a single governing board for the public higher education system in Louisiana is essential

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versity of Tenn., 597 F.2d 1056 (6th Cir.), *cert. denied*, 444 U.S. 886 (1979); *Norris v. State Council of Higher Educ.*, 327 F. Supp. 1368, 1369 (E.D. Va.), *aff'd sub nom. Bd. of Visitors of the College of William and Mary v. Norris*, 404 U.S. 907 (1971); *Bradley v. Bd. of Pub. Instruction*, 171 So. 2d 927 (Fla. Dist. Ct. App. 1965).

[21] *See, e.g., Morrilton School No. 32*, 606 F.2d 222; *Haney*, 429 F.2d 364; *Evans v. Buchanan*, 447 F. Supp. 982.

[22] The district court's experience in fashioning remedial orders has not been limited to school desegregation. District courts have issued similarly extensive remedial orders for state mental health facilities and prisons which do not meet minimum constitutional standards. *See Ruiz v. Estelle*, 679 F.2d 1115 (5th Cir.) *amended in part, vacated in part*, 688 F.2d 266 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983); *Newman v. Alabama*, 466 F. Supp. 628 (M.D. Ala. 1979); *Wyatt v. Stickney*, 344 F. Supp. 373 (M.D. Ala. 1972), *aff'd in part, rev'd in part sub nom. Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974). Extensive remedies have also been ordered to address public housing segregation and employment discrimination. *See United States v. Paradise*, 480 U.S. 149 (1987); *Hills v. Gautreaux*, 425 U.S. 284 (1976); *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 2821 (1988).

to any effective remedy. *See, e.g.*, discussion, *infra* nn.28-30, at 22.

The establishment of a single governing board meets the constitutional criteria for the formulation of desegregation remedies, *see Milliken*, 433 U.S. at 280-81, and is well within the district court's remedial powers. Given the alternatives presented by the other parties, the remedy does not represent an over-intrusive infringement by a federal court on Louisiana's interest in managing its own affairs. State authorities will continue to manage and operate the higher educational system in Louisiana, despite the changes in the governing structure itself. *See* AGM Attachment 2, SA Attachment 8, Remedial Order at 29-32. Moreover, a majority of the members of the new single board also served on the prior four boards. *See* discussion, *infra*, at 30-31; *infra* n.37, at 31.

Consequently, Southern and the Attorney General have failed to establish that the district court's Remedial and Supplemental Orders constitute an abuse of discretion. Considering the deference the Supreme Court has shown lower court stay decisions, and the strict standard of reviewing lower court mandates, it is unlikely that a majority of the Court will consider the remedy issue sufficiently meritorious to note probable jurisdiction, or to reverse the district court's mandate. As Justice Marshall held in *Whalen v. Roe*, 423 U.S. 1315, 1316 (Marshall, Circuit Justice 1975):

> Certainly the judgment of th lower court, which has considered the matter at length and close at hand, and has found against the applicant both on the merits and on the need for a stay is presumptively correct. To prevail here, the applicant must meet a heavy burden of showing not only that the judgment of the lower court was erroneous on the merits, but also that the applicant will suffer irreparable injury if the judgment is stayed pending appeal.

D. The Remedial Order Does Not Impose an Undue Burden On Those Persons Protected by Title VI Or On Predominantly Black Institutions

Relying heavily on *Adams v. Richardson*, 356 F. Supp. 92 (D.D.C.), *modified and aff'd per curiam*, 480 F.2d 1159 (D.C. Cir. 1973), Southern contends that the Remedial Order is likely to be reversed because it imposes an undue burden on predominantly black institutions. SA at 22, *et seq.* The sound educational measures contained in the Remedial Order are designed to further desegregate the schools while improving the quality of education for all Louisiana students. First, the measures will not impose an undue burden on predominantly black institutions, and, second, neither predominantly black institutions nor predominantly white institutions are entitled to protection under Title VI.

Dicta from the *Adams v. Richardson* case has clouded the issue of treatment to be accorded predominantly black institutions. *Adams v. Richardson* is part of the problem, not the solution, and has been used by PBIs to protect their status. Much of the confusion over the treatment to be accorded to PBIs stems from commentary concerning this case.

> "These Black institutions currently fulfill a crucial need and will continue to play an important role in Black higher education." The process of desegregation must not place a greater burden on Black institutions or Black students' opportunity to receive a quality public higher education.

Adams v. Califano, 430 F. Supp. 118, 120 (D.D.C. 1977) (quoting *Adams v. Richardson*, 480 F.2d 1159, 1164 (D.C. Cir. 1973)).

This protectionist language of the *Adams v. Richardson* case has made the task of further desegregation more difficult because it afforded the appearance of legitimacy to subsequent arguments that black institutions must be

maintained to serve black students. As conceded by the Government's principal expert, Dr. Clifton Conrad, the much more intractable problem in Louisiana (and elsewhere) in higher education desegregation is that of increasing white presence in predominantly black institutions, as opposed to increasing black presence in predominantly white institutions. State Attachment 13, Clifton Conrad Deposition, February 6, 1989, "Conrad Deposition") at 313-14. Consequently, the most intractable problem has been made even more difficult to solve because some black administrators and others, relying heavily upon the protectionist language of *Adams v. Richardson* have argued for the maintaining of PBIs for black students, reasoning that only PBIs can educate these students.

Several of Southern's witnesses expressed these sentiments. Dr. Elias Blake argued that a "continuing long-term commitment" to PBIs must be maintained, State Attachment 14, Elias Blake Deposition, February 14, 1989, ("Blake Deposition") at 5. Walter Allen reached basically the same conclusion for the continuation of PBIs, stating that the "Black College bound student" should have the "option" of either a PBI or a PWI. State Attachment 15, Walter Allen Deposition, February 13, 1989 ("Allen Deposition") at 26; *see* State Attachment 16, Gail Thomas Deposition, February 22, 1989 ("Thomas Deposition") at 49-50; State Attachment 17, Joe Terrell Deposition, February 21, 1989 ("Terrell Deposition") at 70. But, surely, the most disturbing argument comes from Dr. Delores Spikes, President of the Southern system, who maintained in her testimony that:

> Historically, white colleges are not capable of addressing the needs of black students because whites are socially and culturally deprived of understanding the needs, desires, abilities, and mores of black students.

State Attachment 18, Dr. Delores Spikes Statement, January 30, 1989, ("Spikes Statement") at 29. When questioned further on this matter, Dr. Spikes reasoned that whites lack understanding of and sensitivity towards blacks at the college level and that there have been numerous racist incidents which would make blacks feel uncomfortable at Louisiana PWIs. State Attachment 19, Dr. Delores Spikes Deposition, February 28, 1989, ("Spikes Deposition") at 85. (Dr. Spikes was, however, able to cite only one incident in contemporary Louisiana higher education which involved the depiction of blacks in an unfavorable manner.)[23]

This view of the mission of predominantly black institutions is merely another form of separatism which cannot be constitutionally condoned in state-supported higher education. Moreover, this attitude has adversely affected the ability of Southern and Grambling to undertake the steps necessary for further desegregation.

The emphasis on the maintenance of PBIs for black students is particularly troubling when the State considers that 58 percent of Grambling's and 28 percent of Southern's 1988 entering freshmen were out-of-state students.[24] Additionally, of all Louisiana resident black entering freshmen in 1988, 56 percent enrolled in PWIs,

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[23] Ironically, immediately after the conclusion of this trial on remedy, counsel for the Grambling Alumni was reported to have stated in an appearance before a group of Southern students that black colleges were under attack in Louisiana and across the nation, that Governor "Buddy" Roemer was a "cousin" to former Ku Klux Klan leader David Duke, and that Louisiana's black schools must be maintained at all costs. State Attachment 20, *Lawyer for Alumni Criticizes Officials*, Morning Advocate, March 18, 1989, at 15D.

[24] State Attachment 21, Hearing Transcript of Dr. James Wharton, March 14, 1989 ("Wharton Transcript") at 194-195. Dr. Wharton relies upon statistics from the Fall 1988 Statewide Student Profile System ("SSPS"), 1987-88 ACT Data, dated March 10, 1989, Report II at 13-106, State Attachment 22, (State's Exhibit 6(b) at trial).

not PBIs.[25] Thus, decisions which might call for "enhancement" funding of institutions as a remedy for findings of Title VI violations[26] may fly in the face of funding choices which will benefit the greatest number of Louisiana's black students. The State, which has already spent over $100 million in supplemental funding at its PBIs under the Consent Decree, *see* discussion, *supra* n.2, at 3, must seriously question its Title VI obligation to spend additional millions of taxpayer dollars on institutions serving black students from Illinois and California.[27]

When one combines the factionalization of governance,[28] the scarcity of resources for higher education,[29] the in-

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[25] State Attachment 23, SSPS Report II at 1-9 (State's Exhibit 6(b) at trial).

[26] Institutions do not have rights under Title VI or the fourteenth amendment. *See* discussion, *infra*, at 32. Therefore, appeals by Southern and the Government for more and more institutional enhancement dollars must be viewed with great skepticism. First, the three-judge court in this case has found that enhancement of the PBIs was a failure, not because too little was spent, "but rather [that the failure] was in the entire structure of the consent decree." *United States v. Louisiana*, 692 F. Supp. at 658. Second, there is little likelihood that any measure which is unaccompanied by the imposition of real admissions standards will ever achieve any significant further desegregation. State Attachment 24, Statement of David A. Wise, January 30, 1989, at 3, 21, 32, 34.

[27] *See* State Attachment 21, Wharton Transcript at 164.

[28] When discussing the current system in Louisiana, Dr. Kerry Davidson refers to the "excessive factionalism that has influenced decisions pertaining to higher education, particularly as [certain] crises . . . have intensified and boards and campuses have attempted to protect their own case." State Attachment 25, Dr. Kerry Davidson Deposition, February 10, 1989 ("Davidson Deposition") at 48.

[29] Dr. Eugene P. Trani notes in his testimony that the State has been "characterized by a lack of proper funding. . . ." State Attachment 26, Dr. Eugene Trani Statement ("Trani Statement") at 22. Dr. Wharton reiterates this view when he says, "[s]tated

stitutional self-interest of all institutions[30] and the efforts of some black leaders to maintain the predominantly black institutions exclusively for black students, the need for greater control through substantial change in governance is clear.

E. The HEW Revised Criteria Are Merely Guidelines and Not Rules

Southern contends that the trial court's Remedial Order Order is likely to be reversed because it does not satisfy the Criteria.[31] Southern further argues that the Criteria are binding on the Court and, thus, by law, the Court can only approve a desegregation plan that meets the Criteria.

Southern's argument fails in several respects. The Criteria, by all accounts, were intended as guidelines for the development of plans for the desegregation of formerly

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simply, *the state's resources are out-of-balance in relation to the higher educational needs of its citizens.*" State Attachment 27, Dr. James Wharton Statement ("Wharton Statement") at 2 (emphasis in original).

[30] Dr. Wharton identifies a "confidence crisis" in Louisiana higher education brought on by "each element of the system [having] its own champions. . . . In this environment each sector or institution conceives its own actions to influence the decision-making process, creating a situation which almost always involves dissidence, mistrust, poor management data and a lack of planning expertise." State Attachment 27, Wharton Statement at 5. Dr. Davidson reports that the problem is "accentuated" by the multiple board system. State Attachment 28, Dr. Kerry Davidson Statement ("Davidson Statement") at 7.

[31] State Attachment 29, *Revised Criteria Specifying the Ingredients of Acceptable Plans to Desegregate State Systems of Public Higher Education*, 43 Fed. Reg. 6,658 (1978); State Attachment 30, *Amended Criteria Specifying Ingredients of Acceptable Plans to Desegregate State Systems of Public Higher Education*, 42 Fed. Reg. 40,780 (1977) ("Criteria" unless otherwise specified).

de jure state systems of public higher education [32] and were never intended as all-encompassing or as limiting the actions a state could take to remedy court findings of discrimination. Because the Criteria were never intended to be rules, the Government made no effort to comply with the rule-making procedures in accordance with the Administrative Procedure Act, ch. 324, 50 Stat. 237 (1947) (codified as amended at 5 U.S.C.A. §§ 551 *et seq.* (1977 & Supp. 1989) ("APA"). Moreover, a blue ribbon panel formed to comment on and criticize the Criteria [33] was not conducted in accordance with the Federal Advisory Committee Act, 86 Stat. 770 (1976), as amended, 90 Stat. 1247, 91 Stat. 1634 (1980), 94 Stat. 3040, 96 Stat. 1822 (1982) (codified as amended at 5 U.S.C.A. App. 2 (1967 & Supp. 1989) ("FACA"). Additionally, at no time has the Government taken the position that the Criteria must be adhered to in desegregation plans. More importantly, the expert testimony supports the trial court's remedy as the more sensible approach to further desegregation, rather than the wooden application of the Criteria which were not developed in a serious manner and were never intended to have the effect of law.

Most importantly, the trial court's remedial mandate, when compared with the elements of a plan suggested by the Criteria, coincides in all significant aspects with those elements.

2. *The Criteria Were Intended To Be Guidelines, Not Rules*

Courts that have considered the effect of the Criteria have declined to bind states and the Government to them. Judge John Pratt, who originally ordered HEW to for-

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[32] Preamble to Criteria, 43 Fed. Reg. at 6659 ("the Court ordered HEW to develop and issue within 90 days specific criteria to guide the six States [footnote omitted] in the preparation of revised desegregation plans").

[33] Preamble to Criteria, 43 Fed. Reg. at 6661.

mulate the Criteria, characterized them as "final guidelines or criteria specifying the ingredients of an acceptable higher education desegregation plan." *Adams v. Califano*, 430 F. Supp. at 121. When faced with the issue of the Criteria's application to proposed desegregation plans, the District Court for the Eastern District of North Carolina found that Judge Pratt had neither adopted the Criteria nor held that they have the force or effect of law. *See North Carolina v. HEW*, 480 F. Supp. 929, 932 n.1 (E.D.N.C. 1979).

Moreover, the United States Court of Appeals for the D.C. Circuit has held:

> When the court ordered the Department [HEW] to enforce [Title VI] in 1973, it did not purport to dictate a fixed formula for choosing among these modes of implementation; *i.e.*, it did not dictate specific compliance criteria but left the choice among lawful criteria to the discretion of the Department and of the states. Similarly, the particular terms of the amended criteria issued by the Department pursuant to the 1977 District of Columbia District Court order were never endorsed or compelled by the district court, and indeed have been subsequently revoked by the Department. Thus, the point of his various court orders, as Judge Pratt explained, was not to specify what the final results of enforcement would be in every detail, nor to decree unalterable requirements for compliance with Title VI, but rather to have the Department initiate the process of enforcement, the process of which the specifics of compliance would then be determined.

Adams v. Bell, 711 F.2d 161, 165-166 (D.C. Cir. 1983) (footnotes omitted), *cert. denied*, 465 U.S. 1021 (1984). Thus, the federal courts that have considered the significance of the Criteria have not strayed from the intent of Judge Pratt. The Criteria serve as guidelines to the de-

velopment of desegregation plans; they do not impose "unalterable requirements" on the drafters of the plans.

Furthermore, the Court should consider the questionable genesis of the Criteria. Testimony in other higher education desegregation cases discloses that the so-called blue ribbon panel organized by HEW to comment on and criticize the Criteria was a mere formality and little, if any, substantive work was performed by the panel. A member of that panel, Harold Howe, II, a former United States Commissioner for Education, and at the time of the panel a vice-president of the Ford Foundation, testified, just three years after the panel was convened, that he had no recollection of what occurred during the panel's meetings.[34] State Attachment 31, Howe Testimony, *In re North Carolina*, HEW Docket 79-VI-1, August 13, 1980, at 2788. Mr. Howe stated:

> I apparently had been at a meeting of that group and apparently that was it, but I could not recall any details of the meeting. It did not make a great impression on me, quite clearly.
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> . . . .
>
> And it doesn't surprise me that I forgot the affair, but I regret that I did, and I can't give much more report than that about it.
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> . . . .
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> I really don't have any solid recollection that would be useful.
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> . . . .

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[34] Mr. Howe testified on August 13, 1980, in an HEW administrative proceeding involving allegations of higher education discrimination in North Carolina. According to Mr. Howe, the blue ribbon panel met in January 1977, State Attachment 31, Howe Testimony, *In re North Carolina*, HEW Docket 79-VI-1, August 13, 1980, at 2787-88; the panel's one meeting actually took place in June 1977.

> And then Joe [Califano]—and I think maybe Joe was being supercilious, because he had heard I had forgotten the meeting.
>
> In any event, he did say, "You did a great job for me, Doc, on that blue ribbon panel," as he got in the elevator. And that's all I can tell you; I made no response.

Id. at 2788-90. Mr. Howe's complete lack of recall regarding the development of the Criteria indicates that Southern is ascribing to the Criteria a more serious and formal character than that contemplated by the participants on the reviewing panel and by HEW itself.[35] That Southern

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[35] Moreover, the blue ribbon panel that commented on and criticized the Criteria was conducted in complete disregard of the FACA. The blue ribbon panel meets the definition of an "advisory committee" under the FACA because it was a panel "established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government . . . ." 5 U.S.C.A. App. I, section 3(2) (subsequently amended on December 21, 1982, and now 5 U.S.C.A. App. 2, section 3(2)). As an advisory committee, the panel failed to meet the requirements of the FACA. There is no record that the public was informed of the advisory committee activities and that the committee itself was aware of views held by members of the public. *See* 5 U.S.C.A. App. I, sections 9-10 (subsequently amended on December 21, 1982, and now 5 U.S.C.A. App. 2, sections 9-10)).

Internal memoranda of HEW indicate that the HEW developers of the Criteria sought to avoid the requirements of the FACA. Richard Cotton, an aide to Peter Libassi, the General Counsel of HEW, who directed the work on the Criteria, wrote in an April 1977 memorandum attaching a proposed list of panel members, "if we meet with these people once or twice, can we avoid the Federal Advisory Committee Act?" State Attachment 32.

In the absence of compliance with FACA, the blue ribbon panel's influence on the Criteria resulted in prejudice to the State because it was not provided an opportunity to render its views to the panel, nor was the State able to obtain any knowledge of the panel's views. The resulting Criteria are unworkable, procedurally flawed and not the exclusive basis for a desegregation plan.

should now attempt to bind the three-judge court to those Criteria is ludicrous.

2. *The Criteria Do Not Comply With Federal Rule-Making Procedures*

The Criteria have never been submitted to the statutorily-mandated agency rule-making process. In fact, the Criteria are not rules as contemplated by the APA and Southern's contention that this Court will reverse the district court because the Remedial Order fails to meet the Criteria is patently wrong.

HEW was authorized under Title VI to establish "rules, regulations, or orders of general applicability" to achieve the objectives of the Title. 42 U.S.C.A. § 2000d-1. Federal agencies must, however, comply with the APA and publish in the *Federal Register* the substance or subject of the proposed rule and notice of a hearing. In addition, interested parties are to be afforded an opportunity to submit evidence on the proposed rule. After the rule has been adopted, the agency must publish in the *Federal Register* the final version of the rule and a statement of its basis and purpose. APA.

The criteria were not published in the *Federal Register* for comment; the Criteria appeared in the *Federal Register* as issued by HEW, without any expectation or solicitation of public comment. HEW held no public hearings on the Critera, but rather the Crtera were the result of "consultations" between HEW and "interested" outside parties (the blue ribbon panel and others involved in the field of higher education). *See* State Attachment 30, *Criteiia Specifying thhe Ingredients of Acceptable Plans to Desegregate State Systems of Higher Education*, 42 Fed. Reg. at 40,782.

"The basic policy of [42 U.S.C. § 553] at least requires that when a proposed regulation of general applicability has substantial impact . . ., notice and opportunity for comment should first be provided." *Pharmaceutical Mfrs. Ass'n v. Finch*, 307 F. Supp. 858, 863 (D.Del. 1970).

The Criteria, if given the status for which Southern argues, would have substantial impact because they affect the State's rights and obligations relating to Title VI compliance and endangers the flow of federal money critical to the state universities' existence. The Criteria, therefore, must comport with the rule-making requirements of the APA. *See N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759 (1969) (Court upheld decision striking down rules sought to be propounded during an adjudicatory proceeding because "[t]here is no warrant in law for the Board to replace the statutory scheme with a rule-making procedure of its own invention"); *Pickus v. U.S. Board of Parole*, 507 F.2d 1107, 1114 (D.C. Cir. 1974) (parole board guidelines affecting substantive rights of persons, consequently, were stricken for failing to be promulgated in accordance with APA).

The issue of the Criteria's status arose in the North Carolina desegregaiton proceedings and the Government conceded that the Criteria were not rules. State Attachment 33, Memorandum in Opposition to Respondents' Motion for Dismissal of the Administrative Proceedings at 18, *In re North Carolina*, HEW Docket No. 79-VI-1 (filed September 4, 1979). In those HEW proceedings the Government stated.

> [T]he *Criteria* are perfectly suited for the purpose for which they were intended: to provide guidance to a state, when it is drafting its desegregation plan, by specifying what HEW believes should be contained in an acceptable plan for desegregation of higher education.
>
> . . . .
>
> Respondents argue that the *Criteria* were not promulgated in conformance with APA requirements. We agree. Respondents argue that the *Criteria* were not published in the *Federal Register* as a proposed rule. We agree. Respondents argue that the *Criteria* are, therefore, not regulations. We agree. Nor were they intended to be.

3. *The Trial Court's Mandate Substantially Incorporates the Elements of a Plan Identified in the Criteria*

Despite Southern's assertion that the district court accorded the Criteria no weight, SA at 27, the Remedial and Supplemental Orders of the trial court address almost all of the voluntary measures for desegregation identified in the Criteria.

For example, the educationally unnecessary duplication of academic programs is addressed in the Remedial Order on pages 15-16, 24 and 35. Efforts to minimize any adverse effect of the court's orders on black students are addressed on pages 27-28, 34, and 36 of the Remedial Order. The enhancement and strengthening of predominantly black institutions is addressed in the Remedial Order on pages 28, 34 and 41 and in the Supplemental Reasons on pages 18-19. Program transfers are addressed in the Remedial Order on pages 38-40. Other race student recruitment and retention are addressed extensively in the Remedial Order on page 42 and include requirements for other-race scholarships, other-race admissions officials, equal opportunity statements, public information efforts and the development of specific relationships between high schools and colleges. College going-rate concerns are addressed on pages 11-12 and 14 of the Remedial Order. Remedial education is addressed in the Remedial Order on pages 21 and 38. Detailed requirements for the hiring of faculty and staff are found in the court's Supplemental Reasons on page 3 and its Supplement Order on pages 1-3. Mission differentiation is addressed extensively in the Remedial Order on page 33. Expanded mobility between two-year and four-year institutions is addressed through the requirement of articulation agreements in the Remedial Order on page 38. Specific schedules are established for implementing the goals of the court's orders, including the establishment of a Monitoring Committee. AGM Attachment 2, SA Attachment 2,

Remedial Order at 29, 32-45; AGM Attachment 3, SA Attachment 10, Supplemental Order at 1, 3, 4-5.

Even a cursory review of the Criteria demonstrates a substantial overlap between the orders of the trial court and the "Elements of a Plan" suggested in the Criteria. State Attachment 29, Criteria, 43 Fed. Reg. at 6651. Mission differentiation; strengthening of the predominantly black institutions; elimination of educationally unnecessary program duplication; establishment of specific timetables; establishment of cooperative programs; reassignment of specific programs, course offerings, resources and/or services among institutions; merger of institutions or branches; attention to high school going-rates; increasing other-race presence; expansion of mobility between two-year and four-year institutions; the desegregation of faculty, administrative staffs, non-academic personnel and governing boards; and submission of plans and monitoring, were all elements identified by the Criteria, *id.* at 6661-63, and addressed by the three-judge court.

Consequently, whatever weight, if any, should be accorded the Criteria, the three-judge district court has, in fact, addressed virtually all of the significant concerns raised by those guidelines.[36]

F. The Applicants Have Failed to Establish That They Will Suffer Irreparable Harm if the Stay is Not Granted

Southern alleges that it will be irreparably harmed by two remedial actions: (1) when the single governing board is formed; and (2) when steps are taken to elim-

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[36] Southern has been of little assistance in identifying for the three-judge court those elements of the Criteria Southern believes went unaddressed. As the trial court recognized, "[b]ecause Southern does not specify what departures from the HEW criteria it contends this Court made, we cannot here address whether in fact there were such departures." AGM Attachment 6, SA Attachment 10, Supplemental Reasons at 6 n.9. There is a reason Southern did not specify the departures—none of significance exists.

inate duplication of non-core courses between the Southern University Law Center and the Paul M. Hebert (LSU) Law Center. The State disagrees with Southern on both counts.

First, it is true that a consequence of the Remedial Order is that the current governance structure will be disbanded and replaced with a single governing board. It is not true, however, that irreparable injury will result to the applicant. Southern is merely one of the four boards with duties and responsibilities for higher education in Louisiana. The Remedial Order provides for the consolidation of the duties and responsibilities of all of the boards and the delegation of these duties and responsibilities to a single governing board. The Remedial Order also provides that nine of the seventeen voting members must be selected from the current governing boards. AGM Attachment 2, SA Attachment 8, Remedial Order at 30. Although the Southern Board of Supervisors will be dissolved, its responsibilities, duties and concerns will become those of the single board, including those concerns for its students, faculty and staff. The new single board will be the most integrated and representive higher education board in the history of Louisiana, much more so than the four boards preceding it.[37]

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[37] Governor Roemer's seventeen appointments to the new single board include ten members (59% of the board) currently serving on Louisiana's four higher education boards, six selections (35%) who are women, six (35%) who are black and seven (41%) who are white males. AGM Attachment 6, SA Attachment 10, Supplemental Reasons at 11. By comparison, Regents currently has sixteen members, thirteen (81%) of whom are white, three (18.75%) of whom are black and three (18.75%) of whom are women. LSU currently has eighteen members, fourteen (78%) of whom are white, four (22%) of whom are black and two (11%) are women. Trustees currently has eighteen members, thirteen (72%) of whom are white, five (28%) of whom are black and four (22%) of whom are women. The current Southern Board has eighteen members, four (22%) of whom are white, fourteen (78%) of whom are black and two (11%) of whom are women. AGM Attachment 2,

Additionally, it should be noted that of the four boards which currently have management responsibility for public higher education in Louisiana, only Southern sees irreparable injury in the Remedial Order. Each of the other boards supports conversion to a single governance structure. *See* AGM Attachment 5, SA Attachment 7, Final Report at 42.

Southern also argues that the merger required between law schools by the court's Remedial Order will cause Southern irreparable harm. While the State also disagrees with the merger, it must be noted that the Remedial Order provides for the merger of the law schools to be phased in over five years. Any preliminary steps taken in that direction during the pendency of an appeal cannot possibly constitute irreparable harm to Southern.

In alleging irreparable harm, Southern would have the Court believe that its respective institutions have constitutional rights to remedies under Title VI and the equal protection clause of the fourteenth amendment. Southern seeks to remedy the finding of liability by obtaining additional state funding to enhance its individual institutions. In the only prior instance in which this issue has been considered, the Eleventh Circuit found that state institutions have no rights under Title VI or any right to relief under 42 U.S.C. § 1983 for violations of the equal protection clause of the fourteenth amendment. *United States v. Alabama*, 791 F.2d 1450 (11th Cir.), *reh'g denied*, 796 F.2d 1478 (11th Cir. 1986), *cert. denied, Board of Trustees of Ala. State Univ. v. Alabama Bd. of Educ.*,

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SA Attachment 8, Remedial Order at 6. The overwhelming majority of the 70 members of the current four boards were not appointed by Governor Roemer.

The Court should also be aware that three of Governor Roemer's appointments to the new single board are current or former members of the Southern Board, one is a former president of the Southern System and one is the former spouse of a former (now deceased) president of Southern.

479 U.S. 1085 (1987). In any event, further desegregation and quality education are the issues here, not money, and the three-judge court has already determined that money alone will not accomplish the desegregation it believes is required. *See United States v. Louisiana*, 692 F. Supp. at 658. The premise that public predominantly black or predominantly white institutions have a statutory or constitutional right to protection under Title VI is false. People have these rights—not institutions. Therefore, Southern's argument that its board or its institutions will suffer irreparable harm if the stay is not granted is without merit.

The Louisiana Attorney General also alleges that the citizens of the State will suffer irreparable harm if the stay is not granted. As previously discussed, the Louisiana Attorney General's view is in complete opposition to the long-standing position of the State as represented by the Governor, and the Attorney General's unexplained tardiness in advancing any position at all mitigates against providing any credence to his assertions. The Court need not examine other of the Attorney General's claims, absent a showing of irreparable harm.

G. Balancing of the Equities Weighs in Favor of Denying the Stay

Even if the Court determines that it must reach the point of balancing the equities, the State is confident that the Court will find that the balance is not in Southern's favor.[38]

If the Court weighs the alleged harm which denying the stay would cause Southern against the irreparable harm granting the stay would cause the other parties and the

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[38] The Remedial Order will actually have the effect of improving Southern substantially by desegregating it further and improving the quality of its educational offerings. *See, e.g.*, AGM Attachment 2, SA Attachment 8, Remedial Order at 33-34.

public, it will deny the stay. The Court, in *Certain Named And Unnamed Non-Citizen Children And Their Parents v. Texas*, 448 U.S. 1327 (Powell, Circuit Justice 1980), balanced a similar risk of harm. The Court was asked to vacate an order which stayed the execution of a injunction pending appeal. The injunction prevented Texas education officials from denying public education to children without legal immigration status. Considering the factors the Court would employ when determining whether to grant an application for a stay,[39] Justice Powell vacated the stay. Justice Powell accorded great deference to the district court's order and denial of the motion to stay, because the district court had considered "voluminous evidence presented during trial." *Id.* at 1332. The word, "voluminous," understates the evidence accumulated during the fifteen years of this litigation.

Likewise, in *Beame v. Friends of the Earth*, 434 U.S. 1310 (Marshall, Circuit Justice 1977), Justice Marshall denied an application for stay primarily because the applicants did not meet the burden of showing the balance of hardships in their favor.

As previously noted, the State has consistently taken strong exception to the trial court's decision in *United States v. Louisiana*, which declared Defendants to be in violation of Title VI. Given, however, that liability has been found, the States does believe that the potential benefits of this Remedial Order to the citizens of Louisiana, both black and white, are so compelling (especially considering the alternatives) that the public interest demands that no stay of execution be issued.

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[39] The criteria for granting a stay were modified when considering whether to vacate court of appeals stay of a district court order: "there must be a significant possibility that a majority of the Court eventually will agree with the District Court's decision." *Certain Named and Unnamed Non-Citizen Children and Their Parents*, 448 U.S. at 1330.

Louisiana public higher education has been in disarray for decades. Over the past fifteen years, the uncertainty and lack of direction associated in part with this litigation, combined with the relentless and inevitable internal competitiveness of the multi-board structure, has had an even more debilitating effect on the State's ability to provide quality education to its students than had been experienced in previous years. For example, the graduation rate for students at Southern's New Orleans campus was 8.5 percent when surveyed over five years from 1982 to 1988, AGM Attachment 2, SA Attachment 8, Remedial Order at 8, and 25.3 percent at its large Baton Rouge campus. *Id.* The predominantly white institutions have fared somewhat better, but only by comparison within Louisiana. LSU's predominantly white main campus, the state's flagship institution, during that same period, graduated only 44.9 percent of its students, the second highest figure for any public institution in the State. *Id.* Lest this Court believe that the predominantly white institutions' attrition failures disproportionately affected white students, it should again be noted again that more than fifty percent of Louisiana's resident black students attending public four-year colleges, attend predominantly white institutions. *See* discussion, *supra* n.25, at 21. The record in this case is replete with evidence of how the multi-board structure not only seriously impeded further desegregation but also quality education. *See generally,* AGM Attachment 5, SA Attachment 7, Final Report; State Attachment 25, Davidson Deposition, at 27-28; State Attachment 34, Joe D. Smith Deposition, February 17, 1989 ("Smith Deposition") at 64.

The changes effected by the trial court's Remedial Order will go far toward ending the factionalism and parochialism which has been largely responsible for Louisiana's higher education disarray. Granting this stay will substantially harm the other parties. It would, in effect, halt the implementation of the plan of further

desegregation,[40] impede quality education and substantially harm the citizens of Louisiana.

Despite the State's view that it is not in violation of Title VI, and assuming that this Court deems it necessary to proceed to an evaluation of a balancing of equities, it seems clear that all the citizens of Louisiana are entitled to a quality system of public higher education. Moreover, the public can only be benefitted by a Remedial Order which results in further desegregation of student bodies, staff and faculty during the pendency of appeal. Where, as here, the current numbers (as a percentage of overall student enrollment) of black youngsters in predominantly white institutions and white youngsters in predominantly black institutions are not large, AGM Attachment 2, SA Attachment 8, Remedial Order at 5, there can be no harm to the public and to the parties if greater numbers of black students attend predominantly white institutions and greater number of whites attend predominantly black institutions while this appeal is pending.

The trial court correctly sensed "that Southern is perhaps less concerned with desegregation than with maintaining its power as a political instiution of the State. . . ." AGM Attachment 6, SA Attachment 10, Supplemental Reasons at 11. This is not the first time the trial court recognized that motivation: "[t]he more troubling implication is that the PBIs while requesting additional money for enhancement, may be more intent on preserving their mission of serving black students than on expanding opportunities for white students." AGM Attachment 2, SA Attachment 8, Remedial Order at 14; *see also* AGM Attachment 6, SA Attachment 10, Supplemental Reasons at 11. Even the Government's principal

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[40] Pursuant to the directions of the lower court, the new governing board has been appointed and Senate confirmation hearings are scheduled for August 14, 1989. *See* AGM Attachment 2, SA Attachment 8, Remedial Order at 30; *see also* AGM Attachment 6, SA Attachment 10, Supplemental Reasons 11, n.11.

witness, Dr. Clifton Conrad, testified that the Southern proposed desegregation plan was "relentlessly self-serving." Attachment 35, Statement of Dr. Clifton Conrad, ("Conrad Statement") at 61.

When the balance of equities is highly factual, as in the instant case, this Court, of necessity, must rely heavily on the balance reached by the court below. In *Block v. North Side Lumber Co.*, 473 U.S. 1307 (Rehnquist, Circuit Justice 1985), Justice Rehnquist denied an application for the stay of an injunction which prevented the sale of lumber pursuant to contracts between the parties to the lawsuit. The district court and court of appeals weighed the equities and held in favor of the respondent lumber company. Justice Rehnquist determined the lower court's conclusion on this highly factual issue should not be disturbed. *Id.* at 1307.

III. CONCLUSION

One member of the three-judge district court, Circuit Judge John Minor Wisdom, has had this case personally before him for more than fifteen years. The current two District Judges were sitting on the trial court at the time the Consent Decree was executed in 1981 and joined with Judge Wisdom in approving that decree. Their intimate knowledge of, and appreciation for, public higher education in Louisiana should be given great deference by this Court. Justice Marshall, in denying a stay of a desegregation order for public primary and secondary schools, noted that the parties had been "mired in litigation for seven years." *Dandridge v. Jefferson Parish School Bd.*, 404 U.S. at 1220. These parties have been mired in litigation for fifteen years and public higher education in Louisiana at last deserves some certainty in its future. Under the circumstances, the surest route to unified, quality education is the implementation of the Remedial Order. A stay, halting the momentum currently generated in Louisiana toward the changes necessary to serve

all its citizens, black and white, would likely guarantee a retrenchment to the *status quo*, which could not be overcome in a dozen generations of Louisiana students. The State urges this Honorable Court to deny the stay so that Louisiana educators may proceed with the business of educating all of the State's children.

Respectfully submitted,

/s/ Joseph J. Levin, Jr.
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CERTIFICATE OF SERVICE

I hereby certify that on August 14, 1989, a copy of the foregoing State of Louisiana Opposition to Application for Stay Filed By Southern University and Motion for Stay Filed By Louisiana Attorney General and Appendix, Volumes I and II, were sent by Federal Express overnight delivery, postage prepaid, to the following:

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/s/ Joseph J. Levin, Jr.
JOSEPH J. LEVIN, JR.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300-A

UNITED STATES OF AMERICA,
Plaintiff,

v.

STATE OF LOUISIANA, *et al.*,
Defendants.

UNITED STATES' ANSWERS TO INTERROGATORIES PROPOUNDED BY DEFENDANTS

The United States, plaintiff herein, submits pursuant to Rule 33 of the Federal Rules of Civil Procedure the following answers to interrogatories propounded by the defendants, filed on September 12, 1980.

Where answers to interrogatories may be derived or ascertained from the examination or inspection of business records, the United States, pursuant to Rule 33 (c), has in its answers specified these records in sufficient detail to permit the defendants to locate and identify them as readily as can the United States. The defendants will be given reasonable opportunity to examine and inspect these records, and to make copies at their expense, at the U.S. Department of Justice, Washington, D.C.

The answers which follow are full and complete to the best of plaintiff's information at this time. However, since discovery in this action is still ongoing, and since analysis of information already discovered has not been

completed, the United States anticipates that answers now provided may require future supplementation. The United States will supplement such answers as required by Rule 26(e).

In addition to answers to defendants' interrogatories filed on September 12, the United States has here provided answers to certain interrogatories filed by defendants on September 5, 1974. These interrogatories had been objected to earlier, or answers had been withheld until a later date pursuant to agreement of counsel. Answers to these interrogatories follow the answers to the September 12 interrogatories.

Respectfully submitted,

JOHN VOLZ
United States Attorney

DREW S. DAYS III
Assistant Attorney General

_____
MORRIS W. REED
Assistant U.S. Attorney

/s/ Nathaniel Douglas
NATHANIEL DOUGLAS

/s/ Howard L. Sribnick
HOWARD L. SRIBNICK

/s/ Donald M. Lewis
DONALD M. LEWIS

/s/ Levern M. Younger
LEVERN M. YOUNGER
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I, Nathaniel Douglas, attorney for the United States, state that, to the best of my knowledge, the following United States' Answers to Interrogatories Propounded By Defendants are true and accurate.

/s/ Nathaniel Douglas
NATHANIEL DOUGLAS

Sworn to and subscribed before me this 16th day of October, 1980.

/s/ Jacqueline D. White
Notary Public

My Commission Expires: January 31, 1981

Interrogatory No. 1:

Insofar as it provides for the governance of or otherwise affects public higher education in the State of Louisiana, do you contend that any provision of the Louisiana Constitution of 1974, as adopted or as implemented, is in violation of Title VI of the Civil Rights Act of 1964 or the Fourteenth Amendment of the United States Constitution or any other law? If so, and with respect to each and every alleged violation, give the following information:

A. identify the provision which you contend is in violation;

B. describe the basis for your contention;

C. identify all documents which you will introduce in support of your contention; and

D. identify all witnesses whom you will call in support of your contention.

Answer to Interrogatory No. 1:

With respect to subparts (A) and B), the United States does not contend that the Louisiana Constitution or any provision of it as adopted violates Title VI of the Civil Rights Act of 1964 or the Fourteenth Amendment of the United States Constitution or any other law. However, the United States does contend that some provisions of the Louisiana Constitution of 1974 have been implemented in a manner to perpetuate the racially dual system of public higher education which existed prior to the time the Louisiana Constitution was adopted and continues to exist at the present time. And the United States contends that notwithstanding the fact that the Louisiana Constitution was adopted at a time when the State and its officials continued to operate an illegally dual system of higher education and the fact that the Constitution contains several provisions regarding public higher education, the Constitution fails to address the disestablishment of the State's dual system.

Moreover, Article 8, Sections 6 and 7 of the Louisiana Constitution required the creation of three boards to supervise and manage Louisiana's public institutions of higher education, The Board of Trustees for State Colleges and Universities, The Board of Trustees of Louisiana State University and Agricultural and Mechanical College and The Board of Supervisors of Southern University and Agricultural and Mechanical College. Since the establishment of the three boards, members have been appointed to each board on a racial basis in order to perpetuate the dual system and consequently each board has operated on a racially segregated basis. The Board of Supervisors of Louisiana State University and Agricultural and Mechanical College currently has seventeen voting members of whom sixteen are white and one is black. The Board of Supervisors of Southern University and Agricultural and Mechanical College currently has seventeen voting members of whom fourteen are black and three are white. The Board of Trustees for State Colleges and Universities also currently has seventeen voting members of whom fifteen are white and two are black.

Additionally, each of the three boards since its establishment has contributed to perpetuating Louisiana's dual system by operating and maintaining the institutions under its jurisdiction on a racially isolated basis and by failing to take affirmative steps to dismantle the dual system. For example, the Board of Trustees for State Colleges and Universities has continued to operate and maintain Grambling State University as an institution for blacks, while operating and maintaining the other institutions under its control as predominantly white vestiges of the dual system; the Board of Supervisors of Southern University has continued to operate and maintain Southern University as an institution for blacks; and the Board of Supervisors of Louisiana State University has continued to operate and maintain Louisiana State University as a white vestige of the dual system.

Finally, the Constitution of 1974 required the creation of the Louisiana Board of Regents and allocated to that Board specific powers and duties relating to public higher education. The Louisiana Board of Regents, like the three management boards, has failed to take adequate affirmative steps to dismantle the State's dual system, and it, like the three management boards, has failed to take adequate affirmative steps to dismantle the State's dual system, and it, like the three management boards, has allowed the State's unconstitutional dual system to be perpetuated.

With respect to documents which will be introduced in support of the above matters, the United States now is able to identify the following documents:

> Louisiana Constitution of 1974, Article 8, Sections 5, 6 and 7;
>
> Plaintiff's First Requests for Admissions and Defendants' Responses and Supplemental Responses: Nos. 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 111, 112, 113, 114, 115, and 116.

The United States intends to call the below named persons as witnesses in support of the contentions stated above: Stephen J. Wright, Albert H. Berrian, William Arceneaux, Jesse Stone, William Junkin, and Joseph Johnson.

Interrogatory No. 2:

Does the plaintiff contend that The Master Plan for Higher Education adopted by the Louisiana Board of Regents dated April, 1978, as adopted or as implemented, is in violation of Title VI of the Civil Rights Act of 1964 or the Fourteenth Amendment of the United States Constitution or any other law? If so, give the following information:

A. identify the provision which you contend is in violation;

B. describe the basis for your contention;

C. identify all documents which you will introduce in support of your contention; and

D. identify all witnesses whom you will call in support of your contention.

Answer to Interrogatory No. 2:

The United States does contend that both the adoption and implementation of the Louisiana Master Plan of 1978 have contributed to the perpetuation of Louisiana's dual system of higher education, and to the extent that the Master Plan does perpetuate the dual system, it does in fact violate Title VI and the Fourteenth Amendment. Moreover, the United States contends that the adoption and implementation of the Master Plan establishes defendants' unwillingness to carry out their constitutional obligation to dismantle the State's dual system.

According to defendants, the Master Plan "represents the most comprehenisve effort ever undertaken in Louisiana to plan for the future of higher education." [Master Plan, p. 124]. However, the Master Plan fails to address the dismantling of the State's racially dual system of higher education. Instead, the Master Plan which "represents the Board of Regents' judgment regarding the appropriate future direction for higher education in Louisiana" clearly proposes to have Grambling University and Southern University continue in the future to serve their historical role, i.e., under-developed institutions to serve black citizens. For example, the current and future mission of each public institution of higher learning is established in the Master Plan squarely on the bases of historic programmatic growth. No acknowledgment is made of the fact that historically Louisiana's black universities were severely limited in what they were per-

mitted to and expected to offer their students, and no effort is made to allow these institutions to overcome the effects of these historic limitations. Likewise, current and future funding is based upon the levels of programmatic offerings available at each particular institution in such a manner as to assure that the historically black institutions which were established as unequal components of the State's higher education system remain as racially isolated unequal components of the higher education structure.

With respect to documents which will be introduced in support of the above matters, the United States now is able to identify the following documents:

The Master Plan for Higher Education in Louisiana, Louisiana Register Vol. 4 No. 4 (Supplement) April 20, 1978

Letter dated January 13, 1969 from Solomon Arbeiter to William Dodd.

Letters dated May 21, 1973 from Peter E. Holmes to Dr. Jesse Bankston and Judge Carlos Spaht.

Letters dated November 10, 1973 from Peter E. Holmes to Dr. Jesse Bankston and Judge Carlos Spaht.

Revised Criteria Specifying the Ingredients of Acceptable Plans to Desegregate State Systems of Public Higher Education issued by the U.S. Department of Health, Education and Welfare, 43 Fed. Reg. 6658, Feb. 15, 1978.

The United States intends to call the below named persons as witnesses in support of the contentions stated above: Stephen J. Wright, Albert H. Berrian, Larry L. Leslie, William Arceneaux, Sharon Beard, Jesse Stone, Roosevelt Steptoe, Virgil Orr, R. W. E. Jones, Lamore J. Carter, and Joseph Johnson.

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August 2, 1989

The Honorable Charles Schwartz, Jr.
United States District Judge
U.S. Courthouse
500 Camp Street, C-525
New Orleans, Louisiana 70130

RE: *United States v. State of Louisiana, et al*
Civil Action 80-3300, Section "A"

Dear Judge Schwartz:

The Memorandum in Support of Motion for Stay of Execution of Judgment Pending Motion for a New Trial and/or to Alter or Amend Judgment; Alternative Motion for Stay of Execution of Judgment Pending Appeal, with Affidavits, filed by the Southern University Board of Supervisors, incorrectly states on p. 10

> "This case is further distinguishable from *Board of Trustees v. Auburn University*, wherein applicants sought to stay a district court order requiring them to submit a proposal for a unitary system. The Supreme Court vacated the stay entered by the 11th Circuit, stating that no real harm attends the mere requirement to submit a plan."

The above passage should read:

> "In the case of *Board of Trustees, Alabama State University v. Auburn University*, the 11th Circuit

granted a stay of a district court order which merely required the board to submit a proposal for a unitary system. The board successfully argued that this requirement placed a "cloud of uncertainty" over the operation of the university."

We attach a copy of the corrected Memorandum.

Very truly yours,

/s/ William J. Jefferson
WILLIAM J. JEFFERSON, ESQ.

cc:
All Counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300

Section "A"

UNITED STATES OF AMERICA,
Plaintiff,

v.

STATE OF LOUISIANA, *et al.*,
Defendants.

MEMORANDUM IN SUPPORT OF MOTION FOR STAY OF EXECUTION OF JUDGMENT PENDING MOTION FOR A NEW TRIAL AND/OR TO ALTER OR AMEND JUDGMENT; ALTERNATIVE MOTION FOR STAY OF EXECUTION OF JUDGMENT PENDING APPEAL, WITH AFFIDAVITS

May It Please the Court:

The standard for granting a stay of a federal court order pending further review has been well established. The applicant must show: (1) the likelihood that he will succeed on the merits; (2) irreparable harm to him if the stay is denied; (3) the absence of irreparable harm to the respondents if the stay is granted; and (4) a strong public interest favoring the stay. *State of Texas v. U.S. Forest Service*, 805 F.2d 524 (5th Cir. 1986); *Ruiz v. Estelle*, 650 F.2d 555 (5th Cir. 1981).

The "likelihood of success on the merits" requirement has been frequently modified to require that the movant

need only present a substantial case on the merits when a serious legal question is involved and show that the balance of equities weighs heavily in favor of granting a stay. *Ruiz v. Estelle, supra.* (relying on *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977).

In *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., supra.*, the district court had granted a stay of its permanent injunction pending appeal. A Motion to Vacate that stay was filed in the District of Columbia Circuit Court of Appeals. In denying the Motion to Vacate, the Court of Appeals held:

> (A) court, when confronted with a case in which the other three factors strongly favor interim relief, may exercise its discretion to grant a stay if the movant has made a substantial case on the merits. The court is not required to find that ultimate success by the movant is a mathematical probability, and indeed, as in this case, may grant a stay even though its own approach may be contrary to movant's view of the merits. The necessary 'level' or 'degree' of possibility of success will vary according to the court's assessment of the other factors. 559 F.2d at 843.

Movant shows that it meets each requirement of the above standards, and accordingly is entitled to a stay of this court's Order of July 19, 1989.

I. LIKELIHOOD OF SUCCESS ON THE MERITS

This court, or higher courts, will likely reverse or substantially modify the July 19 Order in whole or in part upon further consideration and review. Movant has already stated substantial legal questions warranting a modification or vacation of the court's Order in its "*Memorandum in Support of Motion of the Southern University Board of Supervisors for a New Trial and/or*

Motion to Alter or Amend Judgment," particularly on the issue of remedy. The legal arguments therein cited are adopted herein by reference. Neither this Supreme Court nor the Fifth Circuit Court of Appeals has addressed the question of the appropriate legal standards to be applied in fashioning a higher education desegregation remedy. Nonetheless, the remedy imposed in the July 19 Order has virtually reached the limits of this Court's equitable power. It restructures Louisiana's entire higher education system. The imposition of such a sweeping remedy upsets Louisiana's constitutional and educational policy choices, many voted into place directly by the people of Louisiana. These considerations underline the need for this court to permit a careful review of the remedy it has here chosen, in order to avoid unnecessary or inappropriate intrusions on important interests. *See Columbus Board of Education v. Penick*, 439 U.S. 1348, 1351, 99 S.Ct. 24, 26-27 (1978); *Ruiez v. Estelle*, 650 F.2d at 570.

Further, the premise that racially identifiable institutions are per se unconstitutional or otherwise illegal forms the essential foundation of the Order of July 19, 1989. As the court knows, many courts have expressed different views on this question. The so-called *ASTA* line of cases hold that there is no liability in a case such as this—where an official state policy of segregation has long ago ended, the state employs a practice of open admissions to its colleges regardless of race, and there is no evidence of current intentional racial discrimination against any identifiable victim or class of victims. *Alabama State Teachers Association (ASTA) v. Alabama Public School and College Authority*, 289 F. Supp. 784, 787 (M.D. Ala. 1968) (Three-Judge Court), *aff'd per curiam without written opinion*, 393 U.S. 400, 89 S.Ct. 681 (1969); *Ayers v. Allain*, 674 F. Supp. 1523, 1551 (N.D. Miss. 1987), *appeal pending* No. 88-4103 (5th Cir.). This court declined to follow this line of reasoning, and found lia-

bility in line with the reasoning in *Norris v. State Council of Higher Education for Virginia*, 327 F. Supp. 1368, 1373 (E.D. Va.) (Three-Judge Court), *aff'd per curiam without written Opinion sub. nom. Board of Visitors of the College of William and Mary in Virginia v. Norris*, 404 U.S. 90, 91 S. Ct. 227 (1971). (The holding in *Norris* was in fact much more limited.) In both the *ASTA* and the *Norris* cases, the parties sought writs in the Supreme Court. In each case, writs were denied. Thus, there is no definitive standard on liability in higher education desegregation cases. Absent a finding of liability here on the part of the state and its agencies, of course, no remedy would lie. The unsettled state of the law in this area dictates against implementing this plan before final review, which could result in rejection of this plan. *See Garcia-Mir v. Meese*, 781 F.2d 1450 (11th Cir. 1986)

The captioned cause presents many of the issues presented in *Ayers v. Allain, supra.* This case has been argued orally a few weeks ago. Its outcome would be binding on this court. Should the Fifth Circuit determine that there is no basis for liability in its case, a reversal of this court's holding would certainly be warranted. For this reason, if no other, a stay should be granted.

Further, this case is directly appealable to the Supreme Court, a factor frequently cited by the Supreme Court in its decision as to whether a case presents a substantial question. *See New Motor Vehicle Board of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1348 at 1347 98 S.Ct. 359, 361 (1977).

In *Florida Businessmen for Free Enterprise v. City of Hollywood*, 648 F.2d 956 (Fifth Circuit 1981), the appellate court granted a stay of a district court order which upheld a local ordinance, mainly because the applicant showed a great likelihood of success on the merits. In *Atiyeh v. Capps*, 449 U.S. 1312 (1981), Justice Rehnquist, sitting as Circuit Justice, stayed a district court order imposing sweeping changes on Oregon's prison sys-

tem, mainly because the district judge failed to comply the specificity requirements of Rule 65 of the Federal Rules of Civil Procedure. Also, in *Heckler v. Redbud Hospital District*, 473 U.S. 1309 (1985), Justice Rehnquist, sitting as Circuit Justice, stayed an order requiring the Secretary of Health and Human Resources to promulgate new regulations concerning hospitals, because the lower court's order exceeded the relief requested, and was not closely tailored to correct the defect in question.

These authorities, combined with the unsettled premise that racially identifiable colleges and universities are per se illegal, and the arguments advanced respecting the legal appropriateness of the remedy here employed, create a likelihood that movant will prevail in whole or in part on these issues, or, in the very least, that movant has a "substantial case on the merits involving a serious question of law."

II. IRREPARABLE HARM TO APPLICANT UNLESS A STAY IS GRANTED

The July 19 order requires the State to dismantle its four existing boards of higher education and create one new board, within 30 days. This new "Superboard" . . . "shall assume responsibility for managing the state university system and implementing this remedial Order as soon as it is formed." (Opinion and Order, p. 46) ". . . (T)he board shall *immediately* insure that certain high demand course offerings are not duplicated between the State's two public law schools," (Opinion and Order, p. 40) except as necessitated by the required core curriculums at each law school.

Other provisions of the July 19 Order impose a schedule of duties on the new Board and otherwise mandate actions in the near future. However, planning on the part of the State and the commitment of state resources must begin immediately in order to timely implement the court's plan. Two provisions—the requirement to dis-

mantle the existing four boards within thirty days and to take "immediate" steps to eliminate duplication in "non-core curriculum" courses between the two law schools—promise certain, immediate, and irreparable harm, not only to movant, but to other parties to this litigation as well. The affidavits submitted herewith demonstrate this point beyond question.

The Order itself acknowledges that "(M)erger presents many problems without any sure benefits of desegregation. Among the problems are merging student bodies of highly disparate academic backgrounds, potential loss of qualified faculty and administrators who were attracted to a school because of its academic characteristics and goals, and undermining black institutions such as Grambling and Southern with substantial alumni following." (Opinion & Order, pp. 12-13)

In addition, the Special Master found the existence of the Southern University Board of Supervisors crucial to advocate the interests of black students attending state institutions of higher education. (The court's rejection of this finding is one of the bases for applicant's post-trial motions.)

Furthermore, the court noted that:

—Of the students who attend Louisiana's public universities, whites are much better prepared; (Opinion and Order, p. 11)

—PBIs educate more than 50% of black students who enter higher education in Louisiana. (Opinion and Order, p. 12)

Thus, in the face of undisputed findings that black students have special needs; that black students (and white students) prefer to attend institutions where their own race predominates; and that PBIs educate the majority of black students who enter higher education in Louisiana, this court has ordered the dismantling of the

very entity body which the Special Master found vital to protect the interests of those black students.

It is inconceivable that this vital group, the Southern University Board of Supervisors, could be disbanded, then reconstituted in the event that the district court's Order is ultimately reversed, without a crippling loss in effectiveness. And it strains credulity to assume that all the supporting and administrative staff chosen by this board, as well as the other boards, would remain available for re-employment while awaiting final review of the July 19 Order. It is far more likely that large numbers of administrators and faculty members will quickly seek other, more secure positions, rather than risk the prospect that the new board will replace them.

Similarly, any immediate steps to eliminate non-core curriculum duplications in the courses offered by the two public law schools will surely trigger a loss of faculty members at one or the other institutions.

Students who have chosen Southern University and/or the Southern Law School have a concrete fear that they will be unable to continue there through graduation. The court's Order burdens the minds of current students, distracting their attention from their studies. In the minds of some students, the elimination of the Southern Board forbodes the elimination of Southern itself, and this may be particularly true for out-of-state students who, as this court concedes, find Louisiana's PBIs, including Southern, attractive. In the minds of law students, of course, displacement is a present reality under the court's Order.

Every institution subject to this Order will surely lose, in some cases permanently, large numbers of those administrators and faculty members it originally selected. Given the unique role of Southern, these losses, in faculty, administrators, and students, combined with the disruption likely to follow a complete changeover in the personnel and the structure of the management, constitute ir-

reparable harm to Southern and to all of Louisiana's public universities.

III. RELATIVELY MINOR HARM TO OTHER PARTIES TO THIS LITIGATION

The United States Department of Justice, plaintiff in this lawsuit, has never requested that this court dismantle the four boards that currently manage public higher education in Louisiana. Nor has it asked for the merger of the two public law schools. Whatever the merits of these remedies, no person will be significantly prejudiced by a delay in their implementation pending review.

It is true that the United States Supreme Court, and the appellate courts of every federal circuit, have repeatedly emphasized the need for speedy dismantling of segregation and dual systems of education. *See Alexander v. Holmes County School Board of Education*, 396 U.S. 19 (1969); *Buchanan v. Evans*, 439 U.S. 1360 (1980) (Brennan, Circuit Justice); *Frank v. Braddock*, 420 F.2d 690 (5th Cir. 1969) (per curiam).

In these cases, the courts have refused to stay orders to desegregate, citing the "irreparable, often devastating injury to children who experience segregation and isolation." *Buchanan v. Evans, supra. But, see Dayton Board of Education v. Brinkman*, 433 U.S. 406, 420 (1977).

Most such cases involve elementary and secondary students who could not gain admission to schools reserved for whites unless the court's order were implemented. Those cases are thus factually distinguishable from the captioned cause. The students affected by the stay requested herein are adults, or nearly so, attending the institutions of their choice.

In the case of *Board of Trustees, Alabama State University v. Auburn University*, the 11th Circuit granted a stay of a district court order which merely required the

board to submit a proposal for a unitary system. The board successfully argued that this requirement placed a "cloud of uncertainty" over the operation of the university. In contrast, the Order of July 19 mandates concrete actions to dismantle a locally created system and turn the responsibility of management over immediately to the judicially imposed system. (*See also, Garcia-Mir v. Meese, supra*, in which the appellate court declined to stay a district court's order requiring the Attorney General to devise a plan to provide hearings for the "Marielito" detainees, but granted a stay of the order directing him to implement the plan.)

No other institution in the State, nor any board responsible for its management, will suffer any hardship whatsover if the Court's plan is stayed. Each institution will open this fall for registration with the required faculty and staff, and with such funding as the State legislature has already provided.

IV. THE PUBLIC INTEREST IS BEST SERVED BY A STAY

The citizens of this state have a strong interest in maintaining the system of higher education crafted by their own duly elected representatives and voted into effect by the People themselves. The Order of July 19 abolishes this system and replaces it with one created by federal judges.

Although he felt compelled to refuse to grant the requested stay, Justice Lewis Powell, sitting as Circuit Justice, strongly criticized a similar effort in *Moore v. Brown*, 448 U.S. 1335 (1980):

> "The court seemed to perceive little or no harm to the defendants, and to the public interest, resulting from reinstatement of the judge-created election plan. The court's injunction, however, imposes on Mobile County a method of selecting its School Board mem-

> bers that had not been enacted by state or local elected representatives. While the preliminary injunction is in effect, district elections will be held. These elections may produce—indeed, the District Court intended that they produce—Commissioners who would not have been elected under the longstanding system of at-large elections. As Mr. Justice Stevens observed, 'the responsibility for drawing political boundaries is generally committed to the legislative process. *City of Mobile v. Bolden*, 446 U.S., at 91 (concurring opinion. The District Court appeared to ignore the fact that altering the voting system established by Alabama law more than a century ago, and since maintained, is a substantial intrusion on local self-government." 448 U.S. at 1339.

Justice Powell was persuaded to deny the stay request nonetheless, only because it was presented to him on the eve of an election.

In *New Motor Vehicle Board of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1352 (1977), Justice Rehnquist, sitting as Circuit Justice, stayed an order of a district court enjoining a statute regulating automobile dealerships, noting that:

> ". . . statutes are presumptively constitutional and, absent compelling equities on the other side, which I do not find in this case, should remain in effect pending a final decision on the merits by this Court." 434 U.S. at 1352. (Citations Omitted).

The numerous and sweeping changes required by the July 19 Order recall the provisions of the district court's order in *Columbus Board of Education v. Penick*, 439 U.S. 1348 (1978). There, Justice Rehnquist, sitting as Circuit Justice, granted a stay because of the doubtful validity of the order, and because of the severe disruptions the order would create.

The similarities between that case and the captioned cause warrant an extensive quotation from Justice Rehnquist's opinion:

> "If the stay is granted the respondent children's opportunity for a more integrated educational experience is forestalled. How many children and how integrated an educational experience are impossible to discern because of the failure of the courts below to inquire how the complexion of the school system was affected by specific violations.
>
> In contrast, the impact of the failure to grant a stay on the applicants is quite concrete. Extensive preparations toward implementation of the desegregation plan have taken place, but an affidavit filed in this Court by the Superintendent of the Columbus public schools indicates that major activities remain for the four weeks before the new school term begins. These activities include inventory, packing, and moving of furniture, textbooks, equipment, and supplies; completion of pupil reassignments, bus routes and schedules, and staff and administrative reassignments; construction of bus storage and maintenance facilities; hiring and training of new bus drivers; and notification to parents of pupil reassignments and bus information. Such activities cannot be easily reversed. Most important, on September 7 there will occur the personal dislocations that accompany the actual reassignment of 42,000 students, 37,000 of whom will be transported by bus.
>
> The Columbus school system has severe financial difficulties. It is estimated that for calendar year 1978 the system will have a cash deficit of $9.5 million, $7.3 million of which is calculated to be desegregation expenses. Under Ohio law school districts are not permitted to operate when cash balances fall to zero and it is now projected that the Columbus school system will be forced to close in mid-November 1978.

> Financial exigency is not an excuse for failure to comply with a court order, but it is a relevant consideration in balancing the equities of a temporary stay.
>
> Given the severe burdens that the school desegregation will place on the Columbus school system and the Columbus community in general, and the likelihood that four Justices of this Court will vote to grant certiorari in this case, I have decided to grant the stay of the judgment and mandate of the Court of Appeals for the Sixth Circuit and the judgment of the District Court." 439 U.S. at 1352.

In sum, movant has demonstrated a probability of success on the merits, or, at the very least, a substantial case on the merits. Movant and others will be irreparably harmed unless a stay is granted, but no party is likely to suffer serious harm if a stay is granted. Finally, the public interest strongly dictates granting a stay.

For the foregoing reasons, the application of Southern University Board of Supervisors for a stay of the July 19 Order pending further review, should be GRANTED.

Respectfully submitted,

JEFFERSON, BRYAN, JUPITER,
LEWIS & BLANSON

/s/ William J. Jefferson
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Telephone: (504) 561-8933

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300

Section "A"

UNITED STATES OF AMERICA,
Plaintiff

v.

STATE OF LOUISIANA, *et al.*,
Defendants

NOTICE TO JOIN IN MOTION OF THE SOUTHERN UNIVERSITY BOARD OF SUPERVISORS FOR A NEW TRIAL AND/OR MOTION TO ALTER OR AMEND JUDGMENT

COMES NOW, the Attorney General of the State of Louisiana, and joins in the and adopts "Motion of the Southern University Board of Supervisors for a New Trial and/or Motion to Alter or Amend Judgment," and the memorandum in support thereof insofar as such motion and memorandum object to the Court's finding of unconstitutionality of the Constitution and Laws of the State of Louisiana. The Attorney General is duty bound to provide a defense on behalf of the people of the State of Louisiana to protect the Constitution and laws. The Attorney General shows that he heretofore has approved as required by law for the appointment of counsel, the appointment of counsel by the state's constitutional boards of higher education—the Board of Regents, the Board of Trustees, the Louisiana State University Board of Supervisors, and the Southern University Board of Supervisors, in effect as special attorneys general to represent the in-

terests of the respective boards and of the State of Louisiana, and hereby designates one said counsel, that of the Southern University Board of Supervisors, to represent the particular interests of the Attorney General in defending the constitutionality of the state's constitutional provision declared unconstitutional by the Court's Order of July 19, 1989 and which finding is objected to in the motion in which the Attorney General now joins. Further, the Attorney General joins in and adopts the Southern University Board of Supervisors' motion to stay execution of the court's judgment as prayed for.

Respectfully submitted,

WILLIAM J. GUSTE, JR.
Attorney General
State of Louisiana
2-3-4 Loyola Avenue
New Orleans, Louisiana 70112

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading has been served on all counsel of record properly addressed by depositing same in the United States mail with sufficient postage prepaid on this 2nd day of August, 1989.

_____

Attorney of Record

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300

Section "A"

UNITED STATES OF AMERICA,
Plaintiff

v.

STATE OF LOUISIANA, *et al.*,
Defendants

MOTION TO WITHDRAW "NOTICE TO JOIN IN MOTION OF THE SOUTHERN UNIVERSITY BOARD OF SUPERVISORS FOR A NEW TRIAL AND/OR MOTION TO ALTER OR AMEND JUDGMENT" AND MOTION TO ENROLL COUNSEL OF RECORD

[Filed Aug. 3, 1989]

I

On August 2, 1989, undersigned counsel filed a pleading entitled "Notice to Join in Motion of the Southern University Board of Supervisors for a New Trial and/or Motion to Alter or Amend Judgment."

II

The Attorney General of the State of Louisiana now desires to withdraw that pleading and to substitute in its

place a new pleading as evidenced by Attachment "A" which is attached hereto.

III

The Attorney General of the State of Louisiana further moves the court to enroll Mr. Kenneth C. DeJean, First Assistant Attorney General (#4816), Mr. Winston W. Riddick, Executive Assistant Attorney General (#11,263) and Mr. David Sanders, Assistant Attorney General (#11,696) as counsel of record for the State of Louisiana.

Respectfully submitted,

/s/ William J. Guste, Jr.
WILLIAM J. GUSTE, JR.
Attorney General
State of Louisiana
2-3-4 Loyola Avenue
New Orleans, Louisiana 70112

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading has been served on all counsel of record properly addressed by depositing same in the United States mail with sufficient postage prepaid on this 3rd day of August, 1989.

/s/ William J. Guste, Jr.
Attorney of Record

ATTACHMENT "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300

Section "A"

UNITED STATES OF AMERICA,
Plaintiff

v.

STATE OF LOUISIANA, *et al.*,
Defendants

NOTICE TO JOIN IN MOTION OF THE SOUTHERN UNIVERSITY BOARD OF SUPERVISORS FOR A NEW TRIAL AND/OR MOTION TO ALTER OR AMEND JUDGMENT

COMES NOW, the Attorney General of the State of Louisiana, and joins in the and adopts "Motion of the Southern University Board of Supervisors for a New Trial and/or Motion to Alter or Amend Judgment," and the memorandum in support thereof insofar as such motion and memorandum object to the Court's finding of unconstitutionality of the Constitution and Laws of the State of Louisiana. The Attorney General is duty bound to provide a defense on behalf of the people of the State of Louisiana to protect the Constitution and laws. The Attorney General shows that he heretofore has approved as required by law for the appointment of counsel, the appointment of counsel by the state's constitutional boards of higher education—the Board of Regents, the Board

of Trustees, the Louisiana State University Board of Supervisors, and the Southern University Board of Supervisors, in effect as special assistant attorneys general to represent the interests of the respective boards and the State of Louisiana. The Attorney General of Louisiana hereby designates Kenneth C. DeJean, First Assistant Attorney General (#4816), Winston W. Riddick, Executive Assistant Attorney General (#11,263), and David Sanders, Assistant Attorney General (#11,696), to represent the particular interests of the Louisiana Attorney General and the State of Louisiana in defending the constitutionality of the state's constitutional provisions declared unconstitutional by the Court's Order of July 19, 1989 and which finding is objected to in the motion in which the Attorney General now joins. Further, the Attorney General joins in and adopts the Southern University Board of Supervisors' motion to stay execution of the court's judgment as prayed for.

Respectfully submitted,

/s/ William J. Guste, Jr.
WILLIAM J. GUSTE, JR.
Attorney General
State of Louisiana
2-3-4 Loyola Avenue
New Orleans, Louisiana 70112

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading has been served on all counsel of record properly addressed by depositing same in the United States mail with sufficient postage prepaid on this —— day of August, 1989.

_____

Attorney of Record

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300

Section "A"

UNITED STATES OF AMERICA,
Plaintiff

v.

STATE OF LOUISIANA, *et al.*,
Defendants

ORDER

Considering the foregoing motion, the Attorney General of Louisiana is hereby authorized to withdraw the pleading filed by him on August 2, 1989, entitled "Notice to Join in Motion of the Southern University Board of Supervisors for a New Trial and/or Motion to Alter or Amend Judgment" and further, that the Attorney General is hereby authorized to substitute in lieu of and in place of that pleading a new pleading which is evidenced by Attachment "A" which was appended to the foregoing motion.

It is further ordered that Messers. Kenneth C. DeJean, First Assistant Attorney General, Winston Riddick, Executive Assistant Attorney General and David Sanders, Assistant Attorney General are hereby enrolled as counsel of record.

/s/ Charles Schwartz, Jr.
United States District Judge
August 3rd, 1989

AMENDMENT XIV—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State,

to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

Part IV—Jurisdiction and Venue

Chapter 85—District Courts; Jurisdiction

§ 1345. United States as plaintiff

Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commence by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

June 25, 1948, ch. 646, 62 Stat. 933

TITLE 42—THE PUBLIC HEALTH AND WELFARE

SUBCHAPTER V—FEDERALLY ASSISTED PROGRAMS

§ 2000d. Prohibition against exclusion from participation in, denial of benefits of, and discrimination under Federally assisted programs on ground of race, color, or national origin

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Pub.L.88-352, Title VI, § 601, July 2, 1964, 78 Stat. 252.

§ 2000d-1. Federal authority and financial assistance in program or activities by way of grant, loan, or contract other than contract of insurance or guaranty; rules and regulations; approval by President; compliance with requirements; reports to Congressional committees; effective date of administrative action

Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant

or to continue assistance under such program or activity to any recipient as to whom there has been an express failure to comply with such requirement, but such termifinding on the record, after opportunity for hearing, of a nation or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

Pub.L. 88-352, Title VI, § 602, July 2, 1964, 78 Stat. 252.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Civil Action No. 3095-70]

KENNETH ADAMS, *et al.*

v.

JOSEPH A. CALIFANO, JR.

Amended Criteria Specifying Ingredients of Acceptable Plans To Desegregate State Systems of Public Higher Education

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Kenneth Adams, et al., Plaintiffs, v. Joseph A. Califano, Jr., Secretary of the Department of Health, Education and Welfare, et al., Defendants.

In late 1969 and early 1970, the Department of Health, Education and Welfare (HEW) notified ten states that they had not dismantled their statewide dual systems of public higher education. The letters sent by HEW at that time advised each state of its failure to adopt measures necessary to overcome the effects of past segregation and notified the states of their obligation to file a statewide plan for the desegregation of their public systems of higher education.

For the past seven years this Court has reviewed HEW's efforts to desegregate these systems of higher education. Three months ago, this Court found that the Department's effort had not been adequate and directly ordered the Department to require six of the original ten

states to submit new desegregation plans and to set specific standards for those plans.

The Court found that "specific commitments (were) necessary for a workable higher education desegregation plan * * * concerning admission, recruitment and retention of students, concerning the placement and duplication of program offerings among institutions, the role and the enhancement of black institutions, and concerning changes in the racial composition of the faculties involved.

Specifically, this Court entered a Second Supplemental Order directing the Department to transmit to the six states of Arkansas, Florida, Georgia, North Carolina, Oklahoma, and Virginia as well as the Court and the plaintiffs criteria specifying the ingredients of acceptable desegregation plans for their institutions of public higher education.

This Court further directed that HEW require each state to submit, within 60 days of receipt of the criteria, a revised desegregation plan and to accept or reject such desegregation plan within 20 days thereafter.

Where HEW has found a violation of Title VI of the Civil Rights Act of 1964, it is required first to attempt to secure compliance by voluntary means. When those efforts fail, HEW is required to seek enforcement either administratively or through the courts. 42 U.S.C. 2000d-1; 45 CFR 80.7(d)(1), 80.8. These criteria are issued to assist the states in the preparation of desegregation plans as part of the process of securing voluntary compliance.

HEW has developed the attached criteria mindful of the instructions of this Court that the criteria comply with constitutional standards and Title VI, conform with sound educational practices, and take into account the unique importance of black colleges.

PREAMBLE

I. HISTORY OF LEGAL PROCEEDING

The criteria set forth below have been developed by the Department of Health, Education, and Welfare (HEW) pursuant to the specific direction of the United States District Court for the District of Columbia in "Adams v. Califano," Civil Action No. 3095-70. Second Supplemental Order (D.D.C. April 1, 1977). The Court's Order arises out of a lawsuit initiated in 1970 to require HEW to take action to enforce the provisions of Title VI of the Civil Rights Act of 1964.[1]

In 1969, the Office for Civil Rights, OCR, determined that ten states[2] were continuing to operate segregated higher education systems in violation of Title VI of the 1964 Civil Rights Act. Although the states were notified of this finding and were requested to submit corrective plans, no administrative enforcement actions were taken when the states failed to submit plans or submitted plans unacceptable to HEW. In February 1973, the "Adams" litigation resulted in a ruling requiring that HEW take appropriate enforcement action. "Adams v. Richardson", 356 F. Supp. 92 (D.D.C. 1973).

That ruling was unanimously affirmed by the full United States Court of Appeals for the District of Columbia Circuit, although the Court of Appeals modified the District Court's order and directed HEW to attempt to secure acceptable desegregation plans from the ten states before commencing enforcement proceedings. "Adams v. Richardson," 480 F.2d 1159 (D.C. Cir. 1973).

---

[1] Title VI of the Civil Rights Act of 1964 provides: "No person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." 42 U.S.C. 2000d.

[2] Arkansas, Florida, Georgia, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, Pennsylvania, and Virginia.

In 1974, HEW accepted desegregation plans from eight of the ten states.[3] Reports covering the first year of implementation were submitted to HEW in 1975. Subsequently, the plaintiffs in the "Adams" case sought further relief and on April 1, 1977, the Court ruled that the 1974 plans did not comply with the criteria previously announced by HEW and that as previously announced by HEW and that as implemented the plans had failed to achieve significant progress toward higher education desegregation. Based on these findings, the Court ordered HEW to develop and issue within 90 days specific criteria to guide the six states[4] in the preparation of revised desegregation plans.

II. LEGAL AND EDUCATIONAL PRINCIPLES

A. *De jure segregation.* These criteria apply to six states that operated racially segregated systems of public higher education under state law. The Office for Civil Rights found that the continuing racial patterns among institutions reflect the state's failure to remove the vestiges of the state imposed racial segregation in violation of Title VI.

B. *Affirmative duty to take effective steps to eliminate de jure segregation.* Where there has been past de jure segregation, states are required to take affirmative

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[3] Louisiana refused to submit a plan and was referred to the Department of Justice, which filed a lawsuit, ("United States v. Louisiana"), Civil Action No. 74-68 (M.D. La.) in January 1974. The plan submitted by Mississippi was deemed unacceptable by HEW and the matter was referred to the Department of Justice, which filed a lawsuit, "Ayers and United States v. Finch," Civil Action No. D.C. 75-9-K (N.D. Miss.), in March 1975.

[4] The April 1, 1977, Order excludes Pennsylvania (by agreement of the parties to the "Adams" lawsuit) and Maryland, which commenced a separate injunctive suit against HEW's enforcement proceedings now pending in the United States Court of Appeals for the Fourth Circuit ("Mandel v. HEW," No. 76-1494), as well as Louisiana and Mississippi.

remedial steps and to achieve results in overcoming the effects of prior discrimination. HEW's regulation implementing Title VI provides that

> In administering a program regarding which the recipient has previously discriminated against persons on the ground of race * * *, the recipient must take affirmative action to overcome the effects of prior discrimination. 45 CFR 80.3(b)(6)(i).

The 14th Amendment also calls for more than mere abandonment of discrimination through the state's adoption of passive or neutral policies. The United States Supreme Court has held that public school officials have "the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." "Green v. County School Board of New Kent County", 391 U.S. 430, 437-38 (1968).

The affirmative duty to desegregate applies with equal force to higher education. "Norris v. State Council of Higher Education," 327 F. Supp. 1368 (E.D. Va. 1971), *aff'd per curiam*, 404 U.S. 907 (1971); "Lee v. Macon County Board of Education," 267 F. Supp. 458 (M.D. Ala. 1967), *aff'd*, 369 U.S. 215 (1967); "Geier v. Dunn," 337 F. Supp. 573 (M.D. Tenn. 1972). Additionally, the Supreme Court has made it clear that desegregation plans are not adequate unless they are effective. "See Green v. County School Board of New Kent County, supra; Swann v. Charlotte-Mecklenburg Board of Education," 402 U.S. 1 (1971).

Consistent with the requirements of Title VI these criteria set forth the elements of a desegregation plan which would eliminate the effects of past discrimination.

C. *Statewide approach.* The Court of Appeals in its *en banc* opinion in "Adams" directed HEW to undertake a statewide approach and noted the serious problem created by the lack of viable statewide coordinated planning in higher education:

> The problem of integrating higher education must be dealt with on a statewide rather than a school-by-school basis.[10]
>
> [10] It is important to note that we are not discussing discriminatory admission agencies of individual institutions. To the extent that such practices are discovered, immediate corrective action is required, but we do not understand HEW to dispute that point. This controversy concerns the more complex problem of systemwide racial importance. "Adams v. Richardson," supra, 480 F.2d at 1164-1165 (footnote in original).

The Department has followed this approach since 1969 because we believe statewide planning is consistent with sound educational policy. Thus, these criteria require not only that each institution pursue nondiscriminatory student admission and faculty and staff employment practices, but also that the state system as a whole develop a comprehensive and coordinated statewide desegregation plan embodying those specific affirmative, remedial steps which will prove effective in achieving significant progress toward the disestablishment of the structure of the dual system and which address the problem of "systemwide racial imbalance."

D. *Specificity—goals and timetables.* The District Court in "Adams" concluded that the plans previously adopted by the states had failed to achieve adequate desegregation progress and lacked specific commitments for change as concerns the desegregation of student bodies and faculties, enhancement of traditionally black institutions, and desegregation of the governing boards in higher education systems.

The District Court directed HEW to prepare criteria which would identify for the states the specific elements to be included in their revised desegregation plans. As the District Court stated in response to plaintiffs oral argument on January 17, 1977:

> What I do want them to do though is be under the compulsion of a court order to permit to the states certain *specific* requirements which the states must respond to if they should be given a timetable for communicating with the states, and the states should be given some kind of timetable within which to make response. (Transcript, January 17th ruling; emphasis supplied.)

In "Geier v. Blanton", 427 F. Supp. 644 (M.D. Tenn. 1977), the Court quoted its Order of December 23, 1969, expressing its dissatisfaction with a state submitted desegregation plan in that the plan as submitted "lacks specificity, in that there is no showing of funds to be expended, no statement of the number of students to be involved, and most importantly, no time schedules for either the implementation of the projects or the achievement of any goals." 427 F. Supp. at 646.

The Supreme Court has maintained that in a system with a history of segregation there is a need for remedial criteria of sufficient specificity to assure compliance with the law. "See Swann", supra at 25-26.

With respect to the six states here involved, the need to require specific goals and timetables is founded in the comparatively small numbers of black students attending the traditionally white four year institutions and completing graduate training. Further, the numbers of black faculty employed at these white institutions have remained small. Moreover, traditionally black institutions have not been given the facilities, programs, or status comparable to traditionally white institutions.

In keeping with the Court's view that the Department should submit specific requirements to the states, numerical goals and timetables are set forth in the criteria. The goals are established as indices by which to measure progress toward the objective of eliminating the effects of unconstitutional de jure racial segregation and of pro-

viding equal educational opportunity for all citizens of these states. They are benchmarks and provide the states the clear and specific guidance called for by the Court.

These goals are not quotas. The Department is opposed to arbitrary quotas. Failure to achieve a goal is not sufficient evidence, standing alone, to establish a violation of Title VI. In addition, the Office for Civil Rights upon a showing of exceptional hardship or special circumstances by a state, may modify the goals and timetables. Nevertheless, the states are under a statutory obligation to devise and implement plans that are effective in achieving the desegregation of the system.

Most importantly, under these criteria and the goals they set, all applicants must be able to compete successfully. States' efforts under these criteria need not and should not lead to lowering academic standards. States may need to innovate in seeking out talented students who will profit from higher education. They may need to broaden definitions of potential; to discount the effects of early disadvantage on the development of academic competence; and to broaden the talents measured in admission tests. But new and different yardsticks for measuring potential are not lower standards. They can be more valid measures of true potential and talent. Taken as a whole, these criteria seek to preserve and protect academic standards of excellence.

E. *Special considerations in developing criteria for desegregation in higher education.* A state system of higher education, as with an elementary and secondary school district, it held to an affirmative duty to take remedial action to correct past practices of segregation and discrimination. However, the nature of the remedial action required of a higher education system will differ from that required of a local education district. The Court of Appeals in "Adams" noted:

> However, we are also mindful that desegregation problems in colleges and universities differ widely

> from those in elementary and secondary schools, and that HEW admittedly lacks experience in dealing with them * * * As regrettable as these revelations are, the stark truth is that HEW must carefully assess the significance of a variety of new factors as it moves into an unaccustomed area. 480 F.2d at 1164.

In "Norris v. State Council of Higher Education," 327 F. Supp. 1368, 1373 (E.D. Va. 1971), aff'd per curiam, 404 U.S. 907 (1971), the court held:

> The means of eliminating discrimination in public schools necessarily differ from its elimination in colleges, but the state's duty is as exacting.

And in "Sanders v. Ellington," 288 F. Supp. 937, 943 (M.D. Tenn. 1968), the court stated:

> Now in considering the time element for presentation of a plan, I have thought of the complexities of the problem. I recognize that the simple remedies which might be available to a county school board where there is involved a compulsory system of education, a free system of education, and assignment of students, are not available here. Colleges are not compulsory and everyone can testify that they're not free.

Higher education differs from elementary and secondary education in many other ways. Besides being voluntary rather than compulsory, higher education operates on a statewide or regional basis, not local; there are no "attendance zones" in higher education; higher education programs vary from institution to institution and are not uniform; students are free to leave the state or to attend private colleges in pursuit of a higher education.

Furthermore, from state to state significant differences are to be found and must be taken into consideration. In some states strong centralized "system" exists including four year and two year institutions; in others, the four

year and two year institutions report to separate boards; in yet others, each institution operates under its own independent board. While none of these differences relieves a state of its obligations under Title VI or its constitutional duties, they must be taken into account in fashioning an appropriate set of criteria to be applicable to six states.

Accordingly, while desegregation cases involving individual elementary and secondary districts are a guide to a state's duty to take corrective action, they are not dispositive of the particular methods to be designed for the dismantling of a dual system of higher education, for the desegregation of a statewide system, for the removal of the vestiges of racial segregation, and for the correction of "systemwide racial imbalance." As the courts in "Adams" have noted, these are indeed "complex" issues. These criteria are designed specifically for the higher education systems of these six states based on a careful consideration of relevant statutes and court opinions and with due consideration to the unique characteristics of higher education.[5]

F. *The unique role of the traditionally black colleges.* In keeping with the instructions of the Court, the criteria recognize the unique importance of traditionally black colleges in meeting the educational needs of black students. More than 80 percent of all black college graduates have been trained at [6] black colleges. In the mid-seventies, black colleges continue to graduate almost forty percent of all blacks who receive [7] college degrees.

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[5] For a useful discussion of these issues see Note, "The Affirmative Duty To Integrate Higher Education," 70 "Yale Law Journal" 666 (1970).

[6] See Elias Blake, Public Policy and the Higher Education of Black Americans," Staff Report, Subcommittee on Constitutional Rights of the Committee on the Judiciary, 94th Cong. 2d Sess. 1976.

[7] National Center for Education Statistics, Earned Degrees Survey, 1975-76.

Thus it is with good reason that the Court of Appeals in "Adams" recognized the need to take into account "the special problems of black colleges."

> Perhaps the most serious problem in this area is the lack of state-wide planning to provide more and better trained minority group doctors, lawyers, engineers and other professionals. A predicate for minority access to quality post-graduate programs is viable, co-ordinated state-wide higher education policy that takes into account the special problems of minority students and of Black colleges * * * [T]hese Black institutions curently fulfill a crucial need and will continue to play an important role in Black higher education. 480 F. 2d 1164-1165.

Again in 1977, the District Court in its Second Supplemental Order, p. 4, quoted the above language of the Court of Appeals and went on to state:

> The process of desegregation must not place a greater burden on Black institutions or Black students' opportunity to receive a quality public higher education. The desegregation process should take into account the unequal status of the Black colleges and the real danger that desegregation will diminish higher education opportunities for Blacks. Without suggesting the answer to this complex problem, it is the responsibility of HEW to devise criteria for higher education desegregation plans which will take into account the unique importance of Black colleges and at the same time comply with the Congressional mandate.

The Department does not take this language to mean that the traditionally black institutions are exempt from the Constitution or the requirements of Title VI. To the contrary, traditionally black and traditionally white institutions are subject to the same constitutional and congresional mandate to provide an education to all citizens

without discrimination or segregation. White and black institutions are to function as part of a unitary system free of the vestiges of state imposed racial segregation. However, as the Court has instructed, the transition to a unitary system must not be accomplished by placing a disproportionate burden upon black students, faculty, or institutions or by reducing the educational opportunities currently available to blacks.

To achieve the objectives of Title VI, precise methods will need to be fashioned for different institutions within a state, each appropriate to the task of overcoming the effects of prior discrimination in the particular instance. Each method will be enforced with equal force and determination. Each method is designed to achieve the same constitutional standard.

III. CONSULTATION PROCESS

In the preparation of these criteria, the Department undertook an extensive consultation process within the Department and with interested outside parties. In an effort to assure that these criteria are both legally and educationally sound, a departmental task force was established to guide their development. The task force combined the multiple disciplines and varied experitise needed to resolve the complex issues and educational policies involved in this desegregation process. Serving on the task force were the General Counsel, the Director of the Office for Civil Rights, the Assistant Secretary for Education, the Commissioner of Education, and the Assistant Secretary for Planning and Evaluation.

The Department also embarked on a program of open dialogue and consultation with parties of interest. The task force members conferred with representatives of the six states collectively and individually. The representatives included college presidents, education officials, and aides to Governors. A special meeting was held with students who attend the public colleges in the six states

and representatives of several national student organizations. Four meetings were held with officials of the amicus curiae, National Association for Equal Opportunity in Higher Education, an association of the presidents of 110 predominantly black colleges and universities, both states supported and private. Two panels of nationally recognized educators met for half day sessions to advise the Department.

Finally, the plaintiffs' representatives have devoted many hours to reviewing and commenting on drafts of the criteria. They also convened a meeting for the Department with 28 citizens from these six states who are most familiar with the higher education desegregation efforts in their respective states. It is the Department's intention to continue these informal discussions as the most effective means of assuring communications with all parties.

The Department assumes full and sole responsibility for the content of these criteria. The consultations enumerated above were exceedingly helpful to the Department in the preparation of these criteria, but these discussions do not imply concurrence in these criteria in whole or in part by other parties.

Higher educational systems in these and other states are undergoing difficult adjustments caused by fiscal and demographic trends beyond the control of individual states. Accordingl, these criteria focus on desegregation efforts to be undertaken within the next five years.

As each state attains the goals set forth in its plan, OCR will assess, in cooperation with that state, the progress thereby made in order to determine what additional steps, if any, are necessary to complete the desegregation process. Furthermore, during the course of the five year period, OCR will periodically review these criteria to assure their adequacy in meeting constitutional requirements, their consistency with rulings of the courts in

higher education desegregation, and the mandate of Title VI.

ELEMENTS OF A PLAN

I. DISESTABLISHMENT OF THE STRUCTURE OF THE DUAL SYSTEM

An acceptable plan shall commit the state to the goal of organizing and operating the system and institutions of higher education in a manner that promises realistically to overcome the effects of past discrimination and to disestablish the dual system and which assures that students will be attracted to each institution on the basis of educational programs and opportunities uninhibited by past practices of segregation.

To achieve the disestablishment of the structure of the dual system, each plan shall:

A. *Define the mission of each institution within the state system on a basis other than race.* Each mission statement shall include at a minimum:

1. The level, range and scope of programs and degrees offered;

2. Geographic area served by the institution; and

3. The projected size of the student body and staff.

B. *Specify steps to be taken to strengthen the role of traditionally black institutions in the state system.* The plan shall include:

1. Commitments that traditionally black institutions will have the facilities, quality and range of programs, degree offerings, faculties, student assistance, and other resources which are at least comparable to those at traditionally white institutions having similar missions;

2. Commitments that necessary improvements will be made to permit these institutions to fulfill their defined missions;

3. Commitments by the state system for the improvement and expansion of resources, (e.g., physical plant, program offerings, research equipment, financial support, student, faculty and professional staff services) at the traditionally black institutions in accordance with their missions;

4. An assessment of the physical plant at traditionally black institutions; and

5. A detailed description of the resources, expressed in dollars and in numbers of personnel to be assigned, which the state system will provide (and the source for such funds) in order to implement these measures in I.B., reported by year for the life of the measure or activity.

C. *Commit the state to take specific steps to eliminate educationally unnecessary program duplication among traditionally black and traditionally white institutions in the same service area.* The plan shall identify existing degree programs, major fields of study, and course duplication (other than core curricula) among institutions having identical or overlapping service areas and indicate specifically with respect to each area what steps the state will take to eliminate such duplication. The elimination of such program duplication shall be carried out consistent with the objective of strengthening the traditionally black colleges.

D. *Commit the state to give priority consideration to placing any new undergraduate, graduate, or professional degree programs, courses of study, etc., which may be proposed, at traditionally black institutions, consistent with their missions.*

E. *Commit the state to withhold approval of any changes in the operation of the state system or of any institutions that may have the effect of thwarting the achievement of its desegregation goals.*

F. *Commit the state to advise OCR of proposed major changes in the mission or the character of any institution*

within the state system which may directly or indirectly affect the achievement of its desegregation goals prior to their formal adoption. Such proposed changes include but are not limited to: The establishment or major expansion of new programs of study, of departments, or institutions; the alteration of two year to four year institutions; the conversion of a private to a public institution; or the closing or merger of institutions or campuses.

G. *Specify timetables for sequential implementation of the actions necessary to achieve these goals as soon as possible but no later than within five years (by the close of the academic year 1981-82), unless compelling justification for a longer period for compliance is provided to and accepted by the Department.* The plan shall include interim benchmarks and goals from which progress toward these objectives may be measured. These timetables and benchmarks shall be appropriate to the nature of the action to be taken. For example, studies of physical plant and resources comparability should be completed promptly; corrective actions (including capital construction) will require longer time periods.

H. *Commit the state and all its involved agencies and subdivisions to specific measures for achievement of the above objectives.* Such measures may include but are not limited to establishing cooperative programs consistent with institutional missions; reassigning specified programs, course offerings, resources and/or services among institutions; realigning the land grant academic programs so that research, experiment and other educational services are redistributed on a nonracial basis; and merging institutions or branches thereof, particularly where institutions or campuses have the same or overlapping service areas. The measures taken pursuant to this section should be consistent with the objective of strengthening the traditionally black colleges. A description of these measures need not be submitted at the time the plan is filed, but should be filed as a supplementary statement

within 30 days thereafter for review and comment by OCR. Measures that offer no reasonable possibility of achieving the goals listed above will be rejected by OCR. Revised measures will be required before the plan can be accepted.

II. DESEGREGATION OF STUDENT ENROLLMENT

An acceptable plan shall commit the state to the goal of assuring that the system as a whole and each institution within the system provide an equal educational opportunity, are open and accessible to all students, and operate without regard to race and on a desegregated basis.

To achieve the desegregation of student enrollment, each plan shall:

A. *Adopt the goal that for two year and four year undergraduate public higher education institutions in the state system, taken as a whole, the proportion of black high school graduates throughout the State who enter such institutions shall be at least equal to the proportion of white high school graduates throughout the State who enter such institutions.*

B. (1) *Adopt the goal that there shall be an annual increase, to be specified by each state system, in the proportion of black students in the traditionally white four-year undergraduate public higher education institutions in the state system taken as a whole and in each such institution; and*

(2) *Adopt the objective of reducing the disparity between the proportion of black high school graduates and the proportion of white high school graduates entering*[8] *traditionally white four year and upper division undergraduate public higher education institutions in the*

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[8] For the purposes of this subsection, the term entering includes first-time transfers from two year and other institutions.

state system; and adopt the goal of reducing the current disparity by at least fifty percent by the academic year 1982-83. However, this shall not require any state to increase by that date black student admissions by more than 150% above the admissions for the academic year of 1976-77.[9]

C. *Adopt the goal that the proportion of black state residents who graduate from undergraduate institutions in the state system and enter graduate study or professional schools in the state system shall be at least equal to the proportion of white state residents who graduate from undergraduate institutions in the state system and enter such schools.* This goal (and interim benchmarks or goals) shall be separately stated for each major field of graduate and professional study. To assure that this goal can be met in the immediate future special recruitment efforts should be considered at traditionally black institutions. Particular attention should be given to increasing black student enrollment and graduation from those traditionally white four-year undergraduate institutions which serve as the feeder institutions for the graduate and professional schools. Achievement of this goal is of particular importance in light of the specific concern expressed by the Court of Appeals in "Adams." In assessing progress toward this goal, OCR will give consideration to the number of blacks from each state who enroll in graduate and professional schools outside the state system.

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[9] Thus, where the present entry by black *students in four year traditionally white* institutions is at a rate of 1000 students per year and a fully proportional rate would be 3000 students per year, the state's goal would be an entry rate of 2000 students per year by 1982-83. A state where the present entry is at a rate of only 500 students per year and full proportionality would be 3000 students per year would not by that date have to close half the gap (by a rate of 1750 per year) but only achieve an entry rate of 1250 students, which is 150% over its present rate of 500.

D. *Adopt the goal of increasing the total proportion of white students attending traditionally black institutions.* Increased participation by white students at traditionally black institutions must be a part of the process of desegregation of the statewide system of higher education. However, pursuant to the admonition of the courts in "Adams," "The desegregation process should take into account the unequal status of the Black colleges and the real danger that desegregation will diminish higher education opportunities for Blacks." Civil Action No. 3095-70, Second Supplemental Order at p. 4. The following steps are designed to guard against the diminution of higher educational opportunities for black students, to take into account the unique importance of traditionally black colleges and to comply with the mandate of Title VI. Establishment of numerical goals for the enrollment of white students at traditionally black institutions must be preceded by an increasing enrollment of black students in the higher education system and at the traditionally white institutions, as is required by section II of these criteria. It must also be preceded by the accomplishment of specific steps to strengthen the role of traditionally black institutions, eliminate program duplication, locate new programs at black institutions, and by such other measures as are set forth in section I.

OCR shall annually review the progress made by each state in increasing participation by black students in higher education and in the disestablishment of the dual school system. Commencing on September 1, 1979, and consistent with such progress, each state system shall specify annual numerical goals for increasing the participation of white students attending the traditionally black institutions.

E. *Commit the state to take all reasonable steps to reduce any disparity between the proportion of black and white students completing and graduating from the two year, four year and graduate public institutions of higher*

education, and establish interim goals, to be specified by the State system, for achieving annual progress.

F. *Commit the State to expand mobility between two year and four year institutions as a means of meeting the goals set forth in these criteria.*

G. *Specify timetables for sequential implementation of actions necessary to achieve these goals as soon as possible but not later than within five years (by the close of the academic year 1981-82) unless another date is specified in this section.*

H. *Commit the State and all its involved agencies and subdivisions to specific measures to achieve these goals.* Such measures may include, but are not limited to reviewing, monitoring, and revising, as necessary, procedures for student recruitment, admissions, compensatory instruction, counseling, financial aid, and staff and faculty development programs. A description of these measures need not be submitted at the time the plan is filed, but should be filed as a supplementary statement within 30 days thereafter for review and comment by OCR. Measures that offer no reasonable possibility of achieving the numerical goals will be rejected by OCR. Revised measures will be required before the plan can be accepted.

III. DESEGREGATION OF FACULTY, ADMINISTRATIVE STAFFS, NON-ACADEMIC PERSONNEL, AND GOVERNING BOARDS

An acceptable plan shall commit the state system to the goal of increasing the number and proportion of black employees, academic and non-academic, throughout the system and of increasing representation of black citizens among appointive positions on the governing boards of the state system and of individual institutions.

To achieve the desegregation of faculty, administrators, other personnel, and governing boards, each plan shall:

A. *Adopt the goal that the proportion of black faculty and of administrators at each institution and on the staffs of each governing board, or any other state higher education entity, in positions not requiring the doctoral degree, shall at least equal the proportion of black students graduating with masters degrees from institutions within the state system, or the proportion of black individuals with the required credentials for such positions in the relevant labor market area, whichever is greater.*

B. *Adopt the goal that the proposition of black faculty and of administrators at each institution and on the staffs of each governing board or any other state higher education entity, in positions requiring the doctoral degree, shall at least equal the proportion of black individuals with the credentials required for such positions in the relevant labor market area.*

C. *Adopt the goal that the proportion of black non-academic personnel (by job category) at each institution and on the staffs of each governing board or any other state higher education entity, shall at least equal the proportion of black persons in the relevant labor market area.*

D. *Assure hereafter and until the foregoing goals are met that for the traditionally white institutions as a whole, the proportion of blacks hired to fill faculty and administrative vacancies shall not be less than the proportion of black individuals with the credentials required for such positions in the relevant labor market area.*

E. *Specify timetables for sequential implementation of the action necessary to achieve this objective including interim benchmarks and goals from which progress toward the objective may be measured.*

These timetables, interim goals and benchmarks shall be established in light of, and shall specify, the current and projected rates of vacancies in the various job cate-

gories, present and projected labor market availability, and other relevant factors.

F. *Commit the state system to taking specific measures to achieve these objectives.* Such measures may include, but are not limited to employment programs providing centralized recruitment, vacancy, and applicant listings; transfer options; faculty development programs permitting release time for black faculty to attain the terminal degree; and the interchange of faculty on a temporary or permanent basis among traditionally white and traditionally black institutions within the state system. A description of these measures need not be submitted at the time the plan is filed, but should be filed as a supplementary statement within 30 days thereafter for review and comment by OCR. Measures that offer no reasonable possibility of achieving the goals listed above will be rejected by OCR. Revised measures will be required before the plan can be accepted.

G. *Adopt the goal of increasing the numbers of black persons appointed to systemwide and institutional governing boards and agencies so that these boards may be more representative of the racial population of the state or of the area served.*

IV. SUBMISSION OF PLANS AND MONITORING

A. The states of Arkansas, Florida, Georgia, North Carolina, Oklahoma, and Virginia shall within 60 days of receipt of these criteria submit to OCR a desegregation plan for each of their systems of public higher education to implement the foregoing criteria.

1. Each plan shall commit the state to substantial progress toward each of the goals in the first two years of the plan.

2. Each plan shall be signed by the governor and by each official or designated person representing the agencies, associations, commissions, officers, and/or institu-

tions responsible for adopting the systemwide and institutional goals described therein. Such persons or entities must be authorized under state law to perform all actions necessary to achieve these goals.

3. Each plan shall certify that achievement of the goals and interim benchmarks specified therein has been adopted as official policy of each official or agency.

B. OCR shall notify each state of acceptance or rejection of the plan within 120 days of its receipt.

C. It is recommended that each state establish a biracial citizens advisory/monitoring committee to assist the state in monitoring the implementation of the plan.

D. Beginning in August 1978, each state shall submit to OCR by August 15 of each year a comprehensive narrative assessment of its desegregation efforts in the most recent academic year. This narrative assessment shall include:

1. A description of the specific measures which have been taken to achieve the objectives enumerated in the plan and in the criteria;

2. A description of the results achieved, including quantitative indices where appropriate or required.

3. An analysis of the reasons why any steps taken proved inadequate or insufficient; and

4. A description of the steps the state will take to achieve progress and to maintain the timetables set forth in the plan.

E. OCR shall review such narrative reports. If good cause for the failure to meet interim goals is not demonstrated, OCR may impose more stringent requirements, including advance approval by OCR of desegregation methods, in order to assure achievement of the goals of the plan. In the alternative, the Department may initiate enforcement proceedings under Title VI of the Civil

Rights Act of 1964, if compliance with Title VI cannot be achieved by voluntary means.

F. Each plan shall provide that the State will furnish to OCR statistical reports, assessments, and such other information as OCR may deem necessary from time to time in order to determine the effectiveness of the State's efforts to achieve the goals described in these criteria. Such information shall include annual statistical reports in substantially the same format used previously by the affected States pursuant to earlier desegregation plans. Specific dates for the submission of the reports will be established by OCR. In the event that subsequent developments call for the submission of additional data, such requirements will be announced after consultation with the States, and the States and institutions shall have sufficient time to develop the system needed for the gathering of additional data.

V. DEFINITIONS

As used in these criteria:

A. "Department" refers to the U.S. Department of Health, Education, and Welfare. In instances where the "Department" is to take certain actions, they may be performed by the Office for Civil Rights or the Director, Office for Civil Rights, on behalf of the Department.

B. "Institution" means any school, college, junior or community college, university, professional or graduate school, administered by or as an agency of the state government. Four year institution means any school, college, or university that offers a baccalaureate or graduate degree. For the purpose of these criteria, "institution" does not refer to private schools or colleges.

C. "State system" means the aggregate of all state public institutions of higher education within the state, whether or not under the governance of the same state agency or board.

D. "Student" means any person enrolled in an instructional program, whether full-time or part-time, subject to exceptions to be specified by the Office for Civil Rights.

E. "Faculty" means all persons employed by an institution as full-time instructional personnel.

F. "Labor market area" means the geographical area in which an institution or campus traditionally recruits or draws applicants possessing the requisite credentials for vacancies in faculty, administrative, or non-academic personnel positions.

G. "Governing board, means that appointed or elected body, whether or not responsible to the governor of a state or to the state legislature, which is charged under state law with the ultimate responsibility for the administration and operation of institutions within the state system of public higher education. A "governing board" may be responsible for the entire system, for a single campus or institution thereof, or for a specified group of campuses or institutions.

Dated: August 4, 1977.

DAVID S. TATEL,
Director,
Office for Civil Rights.

[FR Doc. 77-23230 Filed 8-10-77; 8:45 am]

RULES OF APPELLATE PROCEDURE

Rule 4. Appeal as of Right—When Taken

(a) Appeals in Civil Cases.

[* * *]

(4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

[* * *]

(As amended Apr. 30, 1979, eff. Aug. 1, 1979; Nov. 18, 1988, Pub.L. 100-690, Title VII, § 7111, 102 Stat. 4419.)

STATE OF LOUISIANA

PARISH OF ORLEANS

AFFIDAVIT

BEFORE ME, the undersigned Notary Public in and for the Parish of East Baton Rouge, State of Louisiana, did personally appear Sharon Beard, who after being duly sworn did depose and say:

1) Affiant has served as the Deputy Commissioner of Higher Education since 1975. As such, she is an employee of the State of Louisiana, responsible to the Louisiana State Board of Regents, and has knowledge of the facts set forth below.

2) Louisiana has twenty institutions of public higher education, which since January 1, 1975, the effective date of the 1974 Louisiana Constitution, have been under the management of three boards. The Board of Supervisors of Southern University and Agricultural and Mechanical College governs: Southern University-Baton Rouge, Southern University-New Orleans, and Southern University-Shereveport/Bossier City. The Board of Trustees for State Colleges and Universities governs: Delgado Community College, Grambling State University, Louisiana Tech University, McNeese State University, Nicholls State University, Northeast Louisiana University, Northwestern State University, Southeastern Louisiana State, and the University of Southwestern Louisiana. The Board of Supervisors of Louisiana State University and Agricultural and Mechanical College governs: Louisiana State University-Baton Rouge, Louisiana State University-Alexandria, Louisiana State University-Eunice, Louisiana State University-Shreveport, the University of New Orleans, the Louisiana State University Medical Center, the Louisiana State University Agricultural Center, and the Paul M. Hebert Law Center.

3) Public institutions of higher education are geographically distributed throughout the state such that the

vast majority of the state's population resides within 40 miles of a public institution of higher education.

4) There is no compulsory attendance in higher education.

5) Public higher education in Louisiana is not free. All of Louisiana's public colleges and universities charge tuition and fees as fixed by their managing boards.

6) The Board of Regents of the State of Louisiana was created by thhe 1974 Louisiana Constitution to plan, coordinate and have budgetary responsibility for all public higher education. It has the following powers, duties and responsibilities relating to public institutions of higher education:

a) To revise or eliminate an existing degree program, department of instruction, division, or similar subdivision.

b) To approve, disapprove or modify a proposed degree program, department of instruction, division or similar subdivision.

c) To study the need for and feasibility of any new institutions of post-secondary education for consideration by the legislature.

d) To formulate and make timely revision of a master plan for higher education, which must include a formula for equitable distribution of funds to the institutions of higher education.

e) To require that every higher education board submit to it an annual budget proposed for operational needs and for capital needs of each institution under the control of each board.

Powers of management over public institutions of higher education not specifically vested in the Board of Regents are reserved to the management boards and to the institutions under their control.

7) The Board of Regents is composed of fifteen members appointed by the Governor with the consent of the Senate and one student member elected by the Council of Student Body presidents. Each of the management boards is composed of seventeen members appointed by the Governor with the consent of the Senate and one student member elected by the Systems Student Advisory Council. All board members serve six-year overlapping terms while the student members serve one-year terms. The present composition of the boards is reflected in Attachment A. From 1981 to the present, the racial composition of each board has changed/not changed as follows:

	1981		1988	
	% White	% Black	% White	% Black
a) Board of Regents	80	20	80	20
b) Southern	12	82	24	76[1]
c) Trustees	88	12	71	29
d) LSU	94	6	76	24

8) The officers of the Board of Regents are Robert J. Bodet (white) Chairman; J.K. Haynes (black) Vice Chairman; and Richard E. D'Aquin (white) Secretary.

The Board of Regents has the following standing committees with membership as indicated.

ACADEMIC AFFAIRS

Thomas D. James, Chairman (w)
John R. Thistlethwaite, V. Chairman (w)
J. K. Haynes (b)
Parletta Holmes (b)
John F. Keller (w)
Edith K. Kirkpatrick (w)
George L. Luffey (w)
Robert G. Pugh (w)
Preston Castille (b)

[1] This figure includes a black member of the Board who resigned in April, 1988 and has not yet been replaced.

FINANCE COMMITTEE

Robert K. Rush, Chairman (w)
George L. Luffey, V. Chairman (w)
Richard E. D'Aquin (w)
J. K. Haynes (b)
Thommas D. James (w)
Gus S. Mijalis (w)
Norbert A. Simmons (b)
Preston Castille (b)

LEGISLATIVE COMMITTEE

Edith K. Patrick, Chairman (w)[2]
Frank O. Pruitt, V. Chairman (w)
Richard E. D'Aquin (w)
J. K. Haynes (b)
John F. Keller (w)
George L. Luffey (w)
Norbert A. Simmons (b)

PERSONNEL COMMITTEE

Robert G. Pugh, Chairman (w)
Gus S. Mijalis, V. Chairman (w)
Parletta F. Holmes (b)
Robert K. Rush (w)
John R. Thistlethwaite (w)
Joseph L. Waitz, Sr. (w)

EXECUTIVE COMMITTEE

Robert J. Bodet, Chairman (w)
J. K. Haynes, Vice Chairman (b)
Richard E. D'Aquin, Secretary (w)
George L. Luffey (w)
John R. Thistlethwaite (w)

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[2] In May, 1988 Ms. Kirkpatrick resigned from the Committee and has not been replaced.

PLANNING AND RESEARCH COMMITTEE

John F. Keller, Chairman (w)
Parletta F. Holmes, V. Chairman (b)
Richard E. D'Aquin (w)
Edith K. Kirkpatrick (w)
Frank O. Pruitt (w)
John R. Thistlethwaite (w)

9) Prior to 1954, the only public colleges open to blacks students were Grambling State University and institutions in the Southern University System.

10) Since the effective date of Title VI of the Civil Rights Act of 1964, Louisiana has had a policy of open admissions for students of all races.[3] Any graduate of a state-approved Louisiana high school is entitled to enroll at a public institution of higher education, without regard to the student's high school grade point average or scores on standardized tests.

11) Funding for public higher education in Louisiana is provided under the *Formula*, a mechanism which generates funds based on student credit hours (SCH's), and generates funds for the function of operation and maintenance (including utilities). The number of SCH's is multiplied by the basic values in the *Formula*'s basic factor chart. (See Exhibit D). SCH's are categorized according to the level of the student. Further, the SCH's are either low cost or high cost; high cost values are assigned those disciplines such as technology and engineering which generally have higher associated costs such as operation of laboratories. All institutions receive the

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[3] Beginning in academic year 1988-89, LSU will establish admissions standards for the Baton Rouge campus as follows:

> New freshmen will be required to have graduated from an approved high school and to have completed 17½ high school units in seven categories: English composition and literature (4); college preparatory mathematics (3); natural science (3); social studies (3); foreign languages (2); computer studies (½); academic electives (2).

same dollar value for the same course. For example, a freshman student taking English at Southern University-Shreveport generates the same SCH dollars as a freshman taking English at LSU-Baton Rouge. The function of operation and maintenance is funded using a range of values based on utilization of the institutions' buildings. Utilities are provided based on the institutions' consumption rate, history and a projected utility rate for the forthcoming year.

12) The *Formula* method is objective in nature. The collection of measurable data from the institutions permits the use of mathematical calculations. Actual SCH production from the prior academic year is used to generate *Formula* dollars. Actual, not estimated, production drives a large portion of the *Formula*. This removes the need for a subjective evaluation and identifies the needs of all institutions in comparable terms. Equitable distribution of funds, and not necessarily equality, is the basic objectives of the *Formula*.

13) The *Formula* contains a "hold-harmless" provision that no institution need request less than the current year's appropriation for *Formula* purposes. This hold-harmless provision results in differing levels of *Formula* implementation among the institutions. If enrollment and subsequent student credit hour production decline, an institution is not penalized by a reduction in *Formula* dollars. The following are examples of the hold-harmless provision at work to the overall benefit of the PBIs: in 1981-82, the statewide average rate of implementation was 97.7%. In that same year Grambling's implementation rate was 118.7%, SUBR's rate was 106.5%, SUNO's rate was 100.0%, and SUSBO's rate was 95.3%. Among PWIs, LSU was implemented at 96.5%, and USL was implemented at 95.3%.

14) The *Formula* is a cost-based and goal-oriented document that is designed, at a minimum, to achieve the

average appropriation per full-time equivalent ("FTE") student of other SREB states.

15) The *Formula* does not extend to the internal allocation of funds for any functional category, specific discipline, or program. The internal allocation necessary for development of an effective program at a particular institution of higher education remains the prerogative of that campus' administration and its governing board.

16) In 1986-87 the *Formula* generated substantially more dollars per FTE student for Southern University-Shreveport/Bossier than any other state institution. Southern-Baton Rouge, Grambling and Southern-New Orleans ranked fourth, fifth and sixth, respectively, out of 17 institutions of public higher education in the amount of state funding received per FTE student. (See Attachment Q).

17) In the fall of 1981, 32,899 (SSPS)/34,480 (HEGIS)[4] black American students attended public institutions of higher education. Of these, 18,812 (SSPS)/18,887 (HEGIS), or 57.2% (SSPS)/54.8% (HEGIS), were enrolled at predominantly white institutions.

18) In the fall of 1981, 97,961 (SSPS)/105,035 (HEGIS)[4] white American students attended public institutions of higher education. Of these, 284 (SSPS)/270 (HEGIS), or 0.3% (SSPS)/0.2% (HEGIS), were enrolled at predominantly black institutions.

19) Fall, 1981 enrollment figures, by race, for the individual institutions are reflected in Attachment B.

20) From 1976 to 1980 black enrollment at the PWIs increased from 15,069 to 16,392.

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[4] The Board of Regents twice annually receives from the public institutions of higher education enrollment data provided by both Statewide Student Profile System (SSPS) and Higher Education General Information Surveys (HEGIS). SSPS data does not include the LSU Medical Center. HEGIS data does not identify Louisiana residents. Data from both systems is reported herein.

21) In 1978-79 black enrollment at LSU-BR stood at 4.5% (SSPS data).

22) On September 8, 1981, the Board of Regents, along with the other defendants in this action entered into the Consent Decree. On September 3, 1982, the Board of Regents and the other defendants entered into the Addendum to the Consent Decree.

23) The state's efforts to implement the Consent Decree have been annually reported in August of each year from 1982 through 1987.

24) The Board of Regents has discharged or overseen the following Consent Decree obligations:

a) *Informational activities.* From 1982-83 through 1987-88, the Board of Regents annually prepared and disseminated informational brochures and pamphlets designed to inform all citizens of educational opportunities available at state institutions and to encourage all citizens to attend other-race state institutions. One such brochure listed all undergraduate institutions and the undergraduate programs offered by each such institution. The Board of Regents also prepared and disseminated a similar brochure listing all institutions that offer graduate and professional programs and describing the programs offered at each such institution. Both brochures provided the address of each institution and information on how to obtain application forms. Both brochures informed the students of available financial assistance and contained a clearly stated nondiscrimination policy. Copies of the undergraduate brochure were sent to all public and private high schools, community colleges and vocational and technical institutions in Louisiana; copies of the graduate brochure were sent to each public and private four-year institution of higher education in the state. Copies of both brochures were also sent to the personnel directors of major private and governmental employees within the state and were made available to the public.

Altogether, no less than 8,000 undergraduate brochures and 4,000 graduate brochures were distributed annually.

The Board of Regents has also prepared, for broadcast on radio stations that have large black audiences, public service announcements designed to encourage other-race students to apply for admission to the various public institutions.

b) *Student Recruitment.* The Consent Decree required that each institution, both predominantly white and predominantly black, develop and submit to the Board of Regents a student recruitment plan designed to attract other-race students. The minimum components for an acceptable plan included commitments to:

(1) employ a person primarily responsible for other-race recruitment;

(2) utilize the appropriate list of students provided by the Board of Regents as required by the Consent Decree;

(3) design and distribute recruitment literature emphasizing other-race students;

(4) provide a list of the high schools to be visited for recruitment purposes;

(5) maintain files of recruitment activities;

(6) prepare and implement advertisements and public service announcements geared to the recruitment of other-race students; and

(7) describe the specific strategies to be implemented to recruit other-race students.

The other-race recruitment plans were submitted to the Board of Regents and approved in December, 1981.

Each year, the Board of Regents recommended to the Governor and the legislature that additional monies be appropriated to the predominantly black institutions for

other-race recruitment as follows: Southern University-Baton Rouge—$143,294; Southern University-New Orleans—$50,095; Southern University-Shreveport—$26,000; Grambling State University—$99,000. The legislature annually appropriated the necessary funds for other-race recruitment activities of the predominantly black institutions from 1982 through 1987.

To assist the institutions in identifying prospective undergraduate other-race students, the Board of Regents obtained from the American College Testing Program and provided to each institution following each administration of the ACT assessment, a list of all Louisiana students (by race) still enrolled in high school who took the American College Test (ACT) and agreed to have their names released.

The Board of Regents also developed and provided to the predominantly white institutions which have graduate and professional programs a list of all black students expected to graduate each year from public and private undergraduate institutions in Louisiana who agreed to have their names released. Each predominantly white institution is required to seek application from qualified students whose names appear on the list. Furthermore, at the Regents' request, the Law School Admission Service made arrangements with Paul M. Hebert Law Center and Southern University Law Center to provide annually lists of students identified by race who were law school applicants and indicated that Louisiana was their state of residence or listed a mailing address in Louisiana. Names of other-race students taking the Medical College Admission Test (MCAT) were annually provided to the Louisiana State University Medical Center through the Office of Minority Affairs at the Association of American Medical Colleges. Information about students taking the Dental Admissions Test was obtained from the American Dental Association.

c) *Access to High School Students.* The Board of Regents and the Board of Elementary and Secondary Education jointly developed and adopted a policy designed to ensure that no Louisiana public institution of higher education would be denied equal access to public high schools to conduct student recruitment activities. Each of the three management boards adopted a policy that prohibited institutions under its control from recruiting at any public or private high school, community college, or other educational institution that did not allow equal access to all public institutions of higher education for purposes of recruitment.

In 1987, following some isolated complaints by predominantly black institutions about recruiting difficulties, the Board of Regents undertook to oversee enforcement of the equal access policy in concert with the Board of Elementary and Secondary Education. By letter dated October 9, 1987, the Board of Regents, through counsel, inquired of each predominantly black institution whether any reported cases of recruiting violations had not been resolved to their satisfaction. The institutions were also invited to notify the Board of Regents of any further recruiting problems. None were reported. The October 9, 1987 letters are Attachment C, *en globo.*

(d) *Student Financial Assistance.* After the signing of the Consent Decree, the Governor's Special Commission on Education Services adopted a policy to ensure that state funds administered by it and available to undergraduate and graduate students would be administered in a manner to assist each institution to achieve its other-race enrollment goals.

The State of Louisiana established a scholarship program to assist those institutions offering professional programs in medicine, dentistry, veterinary medicine, and law to increase the level of other-race participation. One hundred fifty (150) scholarships, in the amount of $5,000 each, have been awarded between 1982 and 1988. On

April 28, 1988, the Board of Regents voted to amend its budget recommendations for the 1988-89 fiscal year to include $110,000 to continue the scholarship program for black students in medicine, dentistry, and veterinary medicine.

e) *Developmental Education.* The Board of Regents adopted a model developmental education program, embodying the following components:

- counseling for developmental education students
- developmental education committee to establish institutional policies on developmental education
- special orientation for developmental education students
- tutorial assistance to supplement classroom instruction
- faculty/staff training in developmental education
- developmental classes in English, reading, and math
- a goal of 25:1 student/faculty ratio in developmental education classes
- annual evaluation with corrective action when appropriate

Each institution developed a program based on the model. Developmental education programs were funded at a higher level than lower level undergraduate programs under the *Formula* as demonstrated in Attachment D. The Board of Regents recommended and the legislature appropriated for the years 1982-83 through 1987-88 substantial monies for developmental education programs at the predominantly black institutions over and above *Formula* appropriations. For the six-year period, these outside-the-*Formula* appropriated funds totalled $8,044,818.

The Board of Regents has evaluated the developmental education programs on an annual basis since 1983. In its June, 1987 evaluation the Board of Regents concluded that the institutions had implemented the developmental education programs as required by the Consent Decree.

f) *Employment.* The staff of the Board of Regents is composed of 32 individuals, 25% of whom are black. Data by EEO categories appear in Attachment E. Moreover, 25% of the new staff hired over the past six years have been black. See Attachment F.

g) *Graduate Fellowship Program.* Under the Consent Decree the Board of Regents established a graduate fellowship program designed to increase the pool of other-race faculty qualified to teach at state institutions. Each September from 1982 through 1987 the Board requested that each institution identify three fields in which other-race faculty recruitment efforts had been unsuccessful because of the lack of qualified applicants. In November, the Board of Regents requested that each four-year predominantly white institution nominate three black persons, and the Southern University System and Grambling State University each nominate one white person lacking the terminal degree to compete for one of ten $10,000 fellowships to support full-time graduate study. Upon completion of the terminal degree, the recipient was asked to teach for at least three years at a Louisiana public institution where he/she would be an other-race faculty member.

As of June 30, 1987, 14 of the 51 graduate fellowship recipients had completed the requirements for the terminal degree. Seven of the 14 graduates were employed at an other-race institution. One graduate fellowship recipient had completed her obligation, and two graduates were seeking employment. A list of the Board of Regents' graduate fellowship recipients for 1982 through 1987 appears as Attachment G. From 1982 through 1987, the legislature appropriated $1,554,313 in

support of the Board of Regents' graduate fellowship funding of $210,000 in 1988-89 for graduate fellowships.

h) *Enhancement of Predominantly Black Institutions.*

(1) *Enhancement of Academic Programs.* Under the Consent Decree a total of 62 new academic programs were approved by the Board of Regents for implementation at the predominantly black institutions. By June 7, 1988, 19 new programs had been put into place at Southern University-Baton Rouge, 14 new programs at Southern University-New Orleans, 18 new programs at Grambling State University, and 11 at Southern University-Shreveport. In addition, five cooperative programs had been approved for implementation by Southern University-Shreveport and Bossier Parish Community College. Two programs prescribed by the Consent Decree have not been implemented by the Board of Regents. Grambling State University withdrew its request for the M.S. in Science Education and Southern University-Baton Rouge requested a Ph.D. in Accounting instead of the prescribed Doctor of Professional Accountancy. The latter request was approved by the Justice Department in 1987. The program proposal has not yet been submitted by SU-BR for approval by the Regents, and Southern has indicated that it may not be ready for submission for some time. The list of the new academic programs, by institution, appears in Attachment H.

To supplement funding provided under the *Formula* and by student fees collected from the new students enrolled in the new academic programs, the Board of Regents has each year since 1982 recommended outside-the-*Formula* funding for the support of these programs. Ordinarily, when an institution implements a new academic program, it is required to support that program entirely from *Formula* and self-generated funds. However, the Regents recognized that the PBIs could not quickly and successfully implement the number of new programs

prescribed by the Consent Decree without added support. It therefore recommended supplemental funding. In doing so, it attempted to develop programmatic budgets comparable to those of other public higher education institutions in the state. The Regents' recommendations were often lower, and sometimes substantially lower, than the predominantly black institutions' requests. The most common disagreements between the Regents and the PBIs related to the number of administrators, faculty, and staff required for a new program, and the salaries of employees. In 1982-83, the legislature appropriated $685,210 in outside-the-*Formula* funds to predominantly black institutions for new academic program support; it appropriated $3,457,343 in 1983-84; $6,641,742 in 1984-85; $11,581,220 in 1985-86; $12,793,859 in 1986-87; and $13,011,782 in 1987-88. Also included is an amount of $284,986 to Grambling for help in operation of their physical plant; $2,964,112 for the Off-Campus Center at Southern University-Shreveport/Bossier City; an amount of $3,745,409 has been appropriated to Southern University-Baton Rouge for operation of the Center for Small Farm Research; an amount of $231,444 was appropriated to Southern University-Shreveport/Bossier City for their Management Information System; and $516,449 was funded for administrative positions at Southern University-Shreveport/Bossier City. Although the Consent Decree terminated on December 31, 1987, the Board of Regents has recommended continued funding of $15,186,520 for these new academic and other program support in 1988-89. A list of the special appropriations for predominantly black institutions from 1982-83 through 1987-88, as well as actual expenditures, appears as Attachment I. The Board's recommended funding for 1988-89 appears as Attachment J.

Included in the new academic programs at the predominantly black institutions are joint allied health programs with the LSU Medical Center. These were established in the fields of medical technology, physical therapy, cyto-

technology, occupational therapy, rehabilitation counseling, and cardiopulmonary science. For the past six years the state has provided an allied health counselor and support staff on each predominantly black campus. These individuals hold joint appointments with the LSU Medical Center and the predominantly black institution and are reimbursed by the LSU Medical Center. They serve full-time at the predominantly black institutions, and the counselor may teach one or more courses in the basic sciences. For the years 1982 through 1987 the legislature appropriated a total of $4,612,516 to support the joint allied health programs at the LSU Medical Center and predominantly black institutions. Despite the termination of the Consent Decree on December 31, 1987, the Board of Regents has recommended additional funding of $474,182 for the Medical Center support of allied health programs in 1988-89.

(2) *Capital Improvements at Predominantly Black Institutions.* Under the Consent Decree the State of Louisiana undertook to improve existing facilities and construct new facilities at the predominantly black institutions such that their physical plants would be comparable to those of similar predominantly white institutions. In 1982, a panel of experts studied the nature and extent of deficiencies at the predominantly black institutions and identified capital outlay projects necessary to upgrade the physical plants of predominantly black institutions. In 1983, the Board of Regents adopted a five-year capital outlay plan, which has been revised annually. A total of $34,213,375 has been appropriated and received by the institutions for capital projects at the predominantly black institutions; and the Regents' capital outlay plan calls for the appropriation and expenditure of an additional $89,831,316. A summary of the capital projects at each predominantly black institution appears as Attachment K. The Board of Regents' 1988-89 five-year capital outlay plan is Attachment L.

A summary of the state funds provided for capital outlay projects at all institutions of public learning from 1982 through 1987 together with the percentage of such funds received by the PBIs, is attached as Attachment R.

A summary of the 1988 Capital Outlay Bill now under legislative review is attached as Attachment S.

(3) *Increased Financial Support.* Prior to the Consent Decree the Board of Regents had recommended parity funding between the Southern Law School and the Paul M. Hebert Law Center. In 1983, the Board of Regents amended the *State Appropriation Formula* to include a parity mechanism. Additionally, from 1982 through 1987 the state provided additional funds in the amount of $285,000 per year to Southern University for enhancement of its law school.

From 1982 through 1987 the legislature additionally appropriated $1,000,000 per year for the enhancement of predominantly black institutions; the enhancement funds were distributed as follows: $373,000 annually to Grambling State University and $627,000 annually to the Southern University System.

(4) *Faculty Development Program.* Each fiscal year from 1982-83 through 1987-88 the Board of Regents recommended $70,000 to Grambling State University and $230,000 to the Southern University System for faculty development. The purpose of this program was to provide advanced educational opportunities for faculty members at Louisiana's predominantly black institutions. Faculty members who lacked the terminal degree were given the opportunity to take paid leaves of absence in order to obtain their terminal degrees. Total appropriations for this program were $1,793,100.

i) *Role, Scope and Mission Statements.*

In April, 1984, the Board of Regents adopted *Excellence in the '80's: The Master Plan for Higher Educa-*

tion in Louisiana. This plan contained statements of the role, scope and mission of each of the public institutions of higher education. As required by the Consent Decree, the Board of Regents requested in December 1981, that Southern University-Baton Rouge, Southern University-New Orleans, and Grambling State University supply revised role statements reflecting the changes in mission that would occur at these institutions as a result of the implementation of the Consent Decree. These revised statements were approved by the Board of Regents in February, 1982, for inclusion in the 1984 master plan.

In the context of institutions of higher learning, the term "mission" refers to the general purpose and scope of an institution. Definition of institutional mission is described in relation to the breadth and depth of the institution's academic offerings, research capabilities, and public service contributions.

Except for Wyoming which has only one public university, all states have public systems of higher education with multiple institutions of differing missions. No state, and certainly not Louisiana, can afford to support all of its institutions as major doctoral granting universities. Additionally, to do so would be educationally unsound and fail to meet the needs of the citizens of the state for diverse educational opportunities and experiences. The missions of Louisiana's universities appropriately recognize different purposes, programs, and emphases for each institution.

Classifications of institutions are generally based upon the number and level of degree programs offered by an institution and the number of fields in which degrees are granted.

The Southern Regional Education Board (SREB) employs a classification system of institutions of higher learning based on this scheme. Eight categories of insti-

tutions ranging from research universities and specialized campuses to two-year colleges are included in SREB's classification system. The SREB model is a comprehensive and appropriate classification with which to illustrate the distinctions among Louisiana's institutions of higher learning. The definitions of institutional groups in the SREB classification are:

CATEGORY	*DEFINITIONS*
Doctoral I	Institutions awarding at least 100 doctoral degrees which are distributed among at least 10 HEGIS categories (two-digit classification) with no more than 50 percent of the degrees in an one category.
Doctoral II	Institutions awarding fewer than 100 but at least 30 doctoral degrees which are distributed among at least five HEGIS categories (two-digit classification).
Doctoral III	Institutions awarding fewer than 30 but at least one doctoral degree.
Masters I	Institutions offering master's level programs in ten HEGIS categories (two-digit classification) and awarding at least 100 masters degrees.
Masters II	Institutions awarding fewer than 100 but at least one masters degree.
Baccalaureate	Institutions that award the baccalaureate degree as the highest degree.
Two-year	Junior Colleges—Institutions that offer the first two years of coursework toward a baccalaureate degree which can be transferred to four-year institutions.
	Comprehensive Community Colleges—Institutions that offer coursework toward a baccalaureate degree transferable to four-

year institutions and coursework leading to an associate degree in occupational or technical programs.

Postsecondary Vocational Schools—Institutions that offer coursework leading primarily to the awarding of certificates or diplomas and which are involved in long-term adult education programs.

Specialized — Stand-alone institutions with specialized degree programs such as medical or health science centers, law schools, fine arts schools, engineering schools, etc.

Attachment M identifies Louisiana's public institutions of higher education according to the SREB classification system.

j) *Approval of and Elimination of Programs*

From September 8, 1981 forward, the Board of Regents, prior to approval of any new academic program at a predominantly white institution, assessed the impact of implementing the program on the achievement of other-race enrollment goals at predominantly black institutions. The Board developed a questionnaire to be completed by each predominantly white institution proposing an academic program and a set of questions to be answered by predominantly black institutions concerning each new academic program which a predominantly white institution proposed. The institutions' responses to these questionnaires were included in impact assessments prepared by the Board for each program proposed by a predominantly white institution and acted upon by the Board of Regents. From 1982 through the present, the Board has considered 130 proposals for new academic programs from predominantly white institutions. Twelve were disapproved, and actions on 6 were deferred on the grounds of quality or need. Of the remainder, the Board disapproved 21 because they posed the risk of impairing

other-race enrollment at predominantly black institutions. The Board deferred action on 5 proposed programs for the same reason. Of the 86 programs approved at predominantly white institutions since 1982, 6 received approval only after the attachment of stipulations designed to encourage other-race enrollment at predominantly black institutions. Most recently, for example, the Board approved the M.S. in Systems Technology at Louisiana State University-Shreveport with the stipulation that all coursework would be offered at Barksdale Air Force Base and no class would begin before 4:30 p.m. The purpose of these restrictions was to prevent the new program from negatively impacting on the Master of Business Administration (Computer Information Systems option) at Grambling State University.

The Board of Regents periodically reviews academic programs at institutions throughout the state to assess educational quality and need. Those programs not meeting the Regents' standard are subject to elimination. In recent years, the state's fiscal crisis has placed added pressure on the Board of Regents to eliminate duplicative programs or programs of inadequate quality and insufficient need. From 1982 through the present the Regents have reviewed 583 programs, 106 of these were located at predominantly black institutions. Of the 503 programs reviewed, 514 were maintained and strengthened, and 69 were terminated; 14 of the programs terminated were located at predominantly black institutions.

Not included in these totals are the "low completer" program reviews which the Board undertook during 1987 due to budgetary constraints. The Board reviewed 459 programs which had produced fewer than 5 graduates during the previous 5 years. 293 of these were maintained and strengthened, while 166 programs were terminated. Among the "low completer" programs terminated, 41 were located at predominantly black institu-

tions. In 36 of the 41 instances of termination, the predominantly black institutions concurred with action by the Regents.

In its reviews of existing programs at predominantly black institutions, the Board of Regents has considered whether elimination might disproportionately affect the institution. This consideration has persuaded the Board of Regents to refrain from terminating several programs at predominantly black institutions that might have been terminated if considerations of duplication, need, and quality alone had been determinative. For example, due to serious questions regarding both quality and need, separate teams of consultants recommended the termination of the architecture and engineering programs at Southern University-Baton Rouge. The Board of Regents, recognizing the importance of these programs to the enhancement of Southern University, voted to maintain and strengthen each program.

25) In addition to the foregoing commitments and actions by the Board of Regents, the state has undertaken a series of programs under the Consent Decree which were designed to promote integration in Louisiana's institutions of public higher education. These include:

a) The employment of an individual whose primary responsibility was to be recruitment of other-race students. A list of the other-race recruiters is attached as Attachment N.

b) Recruitment activities at high schools having substantial other-race enrollment.

c) Development of a recruitment plan containing specific strategies for attracting other-race students.

d) Designing and distributing recruitment literature emphasizing participation of other-race students in campus life.

e) Airing public service announcements geared to the recruitment of other-race students.

f) Utilizing lists obtained from the Board of Regents to recruit other-race students by direct mail.

g) Implementation of a developmental education program to ensure as much as possible the retention of underprepared students in the higher education system.

h) Contacting the Clearinghouse for assistance in identifying potential black applicants.

i) Other affirmative steps to identify and solicit employment applications from qualified other-race persons.

j) Development of cooperative plans including faculty and student exchange programs and the offering of three or more dual or other cooperative degree programs (in the case of proximate institutions).

26) The state's public higher education institutions made bimonthly reports of their activities and progress in implementing these programs to the Consent Decree Monitoring Committee (CDMC) and the CDMC annually reported the state's compliance to the Justice Department and the Court. These reports stated that the institutions had implemented all Consent Decree initiatives.

27) To assist the institutions in their student recruitment efforts, the CDMC annually sponsored an other-race recruiters' conference in 1984, 1985, and 1986, which were attended by representatives of all institutions. At these conferences, the institutions exchanged ideas on effective recruitment strategies. The conference was discontinued in 1987 because of the unavailability of state funds for travel.

28) By fall, 1988 public institutions of higher education statewide reported enrollment of 34,355, (SSPS)/34,532 (HEGIS)[5] black students. Of these 16,292 (SSPS)/16,471)HEGIS), or 47.4 (SSPS)/47.7 (HEGIS) % were enrolled at predominantly white institutions.

29) By fall, 1988 public institutions of higher education statewide reported enrollment of 98,892 (SSPS)/101,576

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[5] See fn. 4, *supra*.

(HEGIS)[3] white students. Of these 1,059 (SSPS)/736 (HEGIS), or 1.1 (SSPS/0.7 (HEGIS) % were enrolled at predominantly black institutions.

30) Fall, 1987 Enrollment figures, by race, for the individual institutions are reflected in Attachment O.

31) Information provided by Southern and Grambling shows the following enrollment, by race, in the new Consent Degree academic programs:

Program(s)	Southern University-Baton Rouge			
	Black	White	Other	Total
B.S. Rehab Counseling	18	0	1	19
Mast Public Admin	45	0	18	63
MA/MS Rehab Counseling	25	2	1	28
B.S. Environ Chemistry	7	0	0	7
B.S. Nursing	54	6	3	63
M.S. Computer Science	30	2	40	72
Ed.D/Ph.D Special Educa	1	0	0	1
M.A./Ed.S Spec Educ *	115	13	3	131
Mast Prof Accountancy	7	0	7	14
Total	302	23	73	398
Percent of Total	75.88%	5.78%	18.34%	

* Joint Degree Proram with LUS-BR

Program(s)	Southern University-New Orleans			
	Black	White	Other	Total
B.S. Transportation	2	0	2	4
B.S. Print Journolism	2	0	0	2
A.S. Computer Science	19	0	1	20
B.S. Technology	3	1	2	6
B.S. Substance Abuse	10	9	0	19
B.S. Criminal Justice	11	1	1	13
Mast Social Work	77	22	5	104
B.S. Urban Studies	3	0	0	3
Total	127	33	11	171
Percent of Total	74.27%	19.30%	6.43%	

Source: SSPSRSMJ

[3] See fn. 4, *supra*.

Program(s)	Grambling State University			
	Black	White	Other	Total
M.A.T. Social Sciences	6	1	2	9
Mast Bus Admin	25	0	15	40
Mast/Ed.S Develop Educ	40	3	3	46
Ed.D Develop Educ	29	8	2	39
B.S. Nursing	310	43	4	457
M.A.T. Natural Sciences	14	0	4	18
Mast Liberal Studies	25	1	2	28
Mast Public Admin	13	1	7	21
Mast Social Work	34	11	0	45
M.S. Crim Justice	30	13	6	49
Total	526	81	45	752
Percent of Total	69.95%	10.77%	5.98%	

Program(s)	Southern University-Shreveport			
	Black	White	Other	Total
AS Early Chldhd Educ	52	1	0	53
AA Day Care Admin	46	2	0	48
AS Small Bus Admin	0	0	0	0
AS Surgical Tech	0	0	0	0
Cert Nurse's Ass't	86	2	0	88
AA Legal Ass't	0	0	0	0
AA Mental Health/Retard	0	0	0	0
AS Computer Sci	49	2	1	52
AAS Banking & Fin	0	0	0	0
AAS Electronics Tech	22	2	0	24
AAS Radiologic Tech	0	0	0	0
AS Hotel/Motel Mgt	0	0	0	0
AA Tourism/Travel Mgt	0	0	0	0
AAS Medical Rec Tech	0	0	0	0
AAS Respiratory Ther	0	0	0	0
Total	255	9	1	265
Percent of Total	96.2%	3.4%	0.4%	

Source: SSPSRSMJ

32) Louisiana's open admissions policy results in the enrollment of thousands of underprepared students at Louisiana's public colleges and universities. In 1987 the composite score on the ACT Assessment for Louisiana high school students was higher than for freshmen entering public higher education, apparently be-

cause many students scoring higher than average on the ACT leave the state.

33) A test taker receives a score of one (1) for signing the answer sheet. ACT representatives advise that random completion of the answer sheet without reference to the questions will yield a score of 7.8. In fall, 1987, eight students enrolled in Louisiana public higher education with a score of 2; 2,148 scored 8 or less on the ACT Assessment. An ACT composite score of 8 was in the 12th percentile in Louisiana, but only the 3rd percentile nationally.

34) In 1987-88, the mean ACT score of Grambling's freshman class was 12.1, with 70% of the class scoring 15 or below. At proximate Louisiana Tech, the mean score was 18.8, with more than 75% of the class scoring 16 or higher. In the freshman class at Southern University-Baton Rouge, the mean ACT score was 12.7 with 67% scoring 15 or below. At proximate Louisiana State University-Baton Rouge, the mean score was 19.8 and more than 80% of the class scored 16 or above. At Southern University-New Orleans, the mean score was 10.7 and nearly 85% of the class scored at 15 or below. At proximate University of New Orleans, the mean score was 17.2 and nearly 70% of the class scored 16 or higher. The ACT profiles by institution for 1981-82 through 1987-88 are appended as Attachment P.

35) There has been considerable debate about the use of ACT scores as a measure of a student's ability or likelihood of success in higher education. However, all students entering institutions of public higher education are required to take the ACT Assessment. There has been a strong correlation between performance on the ACT and attrition in the population studied in the Consent Decree attrition study (of the firsttime freshman class of 1982). In the study population, the attrition rates by ACT interval through summer, 1987, were as follows:

ACT 1-5	ACT 6-10	ACT 11-15	ACT 16-20	ACT 21-25	ACT 26-36
78%	73%	61%	49%	32%	27%

36) Although none of Louisiana's public institutions place students in developmental education based solely on performance on the ACT, it is commonly used as a "flagging" mechanism to identify students for further testing and evaluation.

37) The participation, by race, of first time freshmen in developmental education at the state's proximate institutions of public higher education is as follows:

	Black		White		Other		Total	
	#	%	#	%	#	%	#	%
Grambling	953	83.7	19	86.4	8	80.0	980	83.7
Tech	145	41.0	492	29.0	10	31.3	647	31.1
LSU	321	65.1	1802	46.9	43	18.9	2166	47.5
SUBR	1450	74.0	5	11.1	23	52.2	1478	72.1
SUNO	307	86.5	6	15.0	16	66.7	329	78.5
UNO	424	87.6	918	53.8	130	60.7	1472	61.2

38) LSU-BR has masters level and baccalaureate programs in Criminal Justice. In 1986-87, LSU reported that its total expenditures for both the master's and baccalaureate programs, in which 216 majors were enrolled, were $291,445.

39) LSU-BR has a master's program in Social Work. In 1986-87, LSU reported that its total expenditures for the program, in which 248 students were enrolled as majors, were $786,755.

40) Southeastern has a School of Nursing, in which approximately 677 majors were enrolled in 1986-87. Its total program expenditures for that year were $903,751.

41) Northwestern has reported to have three baccalaureate programs in Industrial Technology. In fall

1987, 99 majors were enrolled and its expenditures for the three programs totalled $117,953 that year.

/s/ Sharon Beard
SHARON BEARD

Sworn to and subscribed before me this 12th day of May, 1988.

/s/ Margaret Woodward
Notary Public

1/B14/D/21

[1] UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300

Section "A"

UNITED STATES OF AMERICA

vs.

STATE OF LOUISIANA, *et al.*

Testimony of CLIFTON F. CONRAD, taken on Monday, February 6, 1989, before Michael L. Turney, Certified Shorthand Reporter in and for the State of Louisiana, at the office of Taylor, Porter, Brooks & Phillips, Attorneys at Law, 451 Florida Boulevard, 8th Floor, Baton Rouge, Louisiana.

[2]

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* * * * *

Exhibits:

(None.)

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BY: MR. WILLIAM J. JEFFERSON
(Attending Monday, February 6.)

—and—

VINCENT P. BLANSON

(Attending Wednesday, February 8.)

Also present:

MS. SHARON BEARD

Reported by:

Michael L. Turney, Certified Shorthand Reporter in and for the State of Louisiana.

* * * *

[303] student body is racially identifiable?

A. Again, we talked about figures the other day of 20 and 30 percent having been used frequently in the courts, 30 or so. I think once an institution hits 25 or so, 25 to 30 percent, that it's not racially identifiable, in general.

Q. So for predominantly black institutions that achieve a racial composition of 25 or 30 percent white, you would consider those no longer to be racially identifiable, if that's what I understand your testimony to be.

A. Yes. Yes, sir.

Q. And for predominantly white institutions, when are they no longer racially identifiable?

A. The same.

Q. The same?

A. Yes.

Q. Do you know of any place, Dr. Conrad, where program transfer has proved successful in increasing other-race presence?

A. Well, there have been some

* * * *

[313] Louisiana?

A. Well, I judged everything against an overarching criteria, and that was: To what extent would a given act contribute or diminish advancement toward integration? And that was the benchmark against which I would look at, for example: Should PBIs be closed, or should several PWIs be closed?

And against that criterion I didn't think that—well, I did consider, to be perfectly honest, that closing some institutions, black and white, might help to advance integration. In all instances I thought that the cost, nonpecuniary as well as pecuniary, would be very substantial, and, hence, not worth the closure.

Q. Is'n it true, Dr. Conrad, that the most intractable problem in Louisiana and all of the stays which have publicly predominantly black institutions that the most

intractable problem is increasing white presence in those institutions? That is much more intractable than introducing black students to predominantly white institutions?

[314] A. Well, I think you can infer that from my report, yes.

Q. Well, is it true, or not?

A. It's a very difficult problem.

Q. Isn't it true, Dr. Conrad, that it is a much more difficult problem to get white students into predominantly black institutions than black students into predevelopmently white institutions?

A. Yes.

Q. So would not the closing of the predominantly black institutions free up both, under some method that I'm sure all of you people in higher education provides, without grandfather provisions and other kinds of provisions, free up a significant number of present and future black students to make significant inroads into the increased minority presence of black students in higher education and on the white campuses in Louisiana?

A. Yes. Yes, I did.

Q. And then your most intractable problem is—

A. As well as the vice versa.

[315] Q. Then your most intractable problem would disappear, would it not?

A. Yes. There would be—largely dissipated.

Q. During your several hours of discussions with Mr. Jefferson in Washington, did you discuss with him the possible remedy of the closing of the predominantly black institutions to achieve desegregation in Louisiana as a topic of discussion with Mr. Jefferson?

A. Generally speaking, we talked about what I felt about different remedies, yes.

Q. Did you discuss that remedy in particular?

A. The closing of the back institutions?

Q. Yes, sir.
A. No, I don't think I discussed it with him.
Q. Have you ever discussed it with Mr. Jefferson?
A. No.
Q. Did you ever discuss it with any

* * * *

[1] UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300

Section "A"

UNITED STATES OF AMERICA

versus

STATE OF LOUISIANA, *et al.*

VOLUME I

DEPOSITION OF DR. ROBERT B. GEX, 7533 Oak Street, New Orleans, Louisiana 70118, taken before Cindy K. Tregre, Certified Shorthand Reporter in and for the State of Louisiana, taken in the Law Offices of Jefferson, Bryan, Gray, Jupiter & Blanson, Suite 1850, 650 Poydras Street, New Orleans, Louisiana, commencing on Thursday, the 16th day of February, 1989.

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REPORTED BY:

CINDY K. TREGRE
Certified Shorthand Reporter
In and for the State of Louisiana

• • • •

[20] Q. In 1972 what was the racial composition of the faculty in the evening college?

A. I would imagine—I don't know exactly but I would imagine about 60 percent Black and approximately 40 percent White.

Q. Okay. What was the racial composition of the adjunct professors to the best of your recollection?

A. I would imagine approximately the same, but I really don't know.

Q. Okay. What was the racial composition of the faculty as a whole in 1984 in the Evening and Weekend College at SUNO?

A. I don't know but I would assume that it would have been approximately 60 percent Black and approximately 40 percent White.

Q. So it didn't change over a—from 1972 to 1984?

A. Well, the numbers changed but the percentages would not have changed [21] very much.

Q Okay. What was the racial composition of those faculty members who were adjunct professors in the college in 1984?

A. I don't know, but I would assume that again the adjunct professors were probably around 30 to 40 percent White and 60 to 70 percent Black.

Q. Was part of your job as dean or as an administrator we'll say, because I think you said you had other titles besides dean, as administrator was part of your job responsibility the recruitment of faculty members?

A. Yes, it was.

Q. Did you as dean make any efforts specifically directed during that time period toward the recruitments of other race faculty members?

A. If by that question you mean did I set out to recruit White faculty members?

[22] A. That's what I mean, yes, sir.

A. (Shaking head negatively).

Q. No?

A. No, I didn't, but the fact of the matter is we were always looking for the best qualified faculty we could find. We had a number—generally we did not have to go out and recruit faculty. They generally came in to inquire about positions, availability of positions and we had them fill out a teacher application form which we kept on file and we could go to that file and bring those people in as necessary.

Q. Was it your testimony that as dean you were satisfied with the racial composition of the faculty during that time?

A. To be absolutely honest, I wasn't concerned with the racial composition of the faculty at that time. I was only concerned with having the best faculty I could recruit and I [23] really was not concerned with any particular numbers of Black faculty or White faculty.

Q. Okay. 1984 to 1987 I see from your response to Question Number 2 you served as associate vice chancellor for academic affairs at Southern University in New Orleans; is that correct?

A. Yes, sir.

Q. Could you describe your job responsibility for me in that capacity.

A. Okay. I was basically the assistant to the vice chancellor for academic affairs, and was responsible for the same duties he was responsible for in his absence; however, I had certain responsibilities delegated to me and that was schedule making, overseeing the general programs of the university, academic programs of the university, serving on certain committees as the representative of the vice chancellor of academic affairs [24] such as the curriculum committee among others. In general, whatever duties and responsibilities he delegated to me.

Q. And from 1987 to November of 1988 I see from your response to Question Number 2 in your report you

served as vice chancellor for academic affairs; is that correct?

A. That's correct, yes, sir.

Q. Could you tell me about your job as vice chancellor of academic affairs?

A. Sir, the responsibility was all encompassing for the academic programs of the university. That was—and that included registration, the library, the program quality on the various programs, having—setting up programs for accreditation, visits, just any number of things, yes.

Q. Did you have any responsibility in your capacity as vice chancellor for other race recruitment, other race student recruitment?

[25] A. Specifically, no.

Q. What do you mean by specifically?

A. What I mean is that there was—at that time under the Consent Decree there was an office that was set up called the other race recruiter that was part of our high school relations, recruitment efforts.

Q. Yes, sir.

A. And that did not come under the purview of the vice chancellor, et cetera.

Q. Whose purview did that come under?

A. I guess under the office of student affairs. I really don't remember.

Q. Okay. And since December 1, 1988, you've been the interim chancellor at SUNO; is that correct?

A. Yes, sir.

Q. Okay. Would it be fair to say from 1972 to the present time you've been a part of the administration at [26] Southern University in New Orleans?

A. Yes, I guess that would be a fair statement.

Q. Okay. Would you describe for me, if you would, sir, the efforts during that period as best you know them of the administration at SUNO in terms of other race, i.e., White student recruitment?

A. As far as I know the other race student recruitment was done primarily by the high school relations

office and specifically the other race recruiter, and since I was not responsible for either directing or overseeing any of his efforts I'm not really sure what that entailed. However, during—as far as—to the best of my knowledge what it did entail was while some other high school members of the high school relations office might have recruited students, made visits in predominantly Black schools, the other race recruiter had the responsibility for attempting to do [27] the same thing in predominantly White schools, and was responsible and had the responsibility—and I don't know whether there were any quotas set for him by the administration other than the ones that were set in the Consent Decree itself as to the number of other race students he was expected to recruit.

Q. Okay. Well, do you know what measures other than recruiting at high schools at that time were taken, once again while you were part of the administration at SUNO, to increase the White enrollment at SUNO?

A. I do know that there were a number of displays put in—answer desks and so forth put in the malls of certain shopping centers.

Q. Yes, sir.

A. There were efforts made through ACT lists that would come out that letters were sent to attempt to recruit other race students. I do know that there was a distinct effort made [28] to involve faculty members along—on these trips to the high schools to recruit other race students, but specifically other than those general things, I don't know what the results of those were.

Q. Okay. In you job as interim chancellor, have you ever had occasion to inquire into what those efforts were and how successful they were?

A. No, sir.

Q. Is there a reason for your not inquiring?

A. Well, all I can tell you is I had no reason to inquire. The question never came up.

Q. Could you describe to me, if you would, sir, once again from your perspective as an administrator begin-

ning in 1972 at SUNO the efforts that were made by the administration at SUNO to recruit other race, i.e. White faculty members?

A. I really do not feel qualified to answer that question [29] because while I was a member of the administration—of as you put it the administration, there were other levels and other administrators who had that responsibility. It was not mine until I moved into the office of the associate vice chancellor for academic affairs.

Q. Uh-huh (affirmative response).

A. And in that case, I can—so that I cannot speak to what, quote, unquote, the administration of SUNO was doing from '72 to '84 to recruit White faculty. Now if you'd like—

Q. I'm sorry. I thought you were through.

A. If you'd like me to answer after '84, I can tell you that we—whenever vacancies occurred, we had the list of available White faculty from the—is it the SERB or one of the agencies, some state clearing house agency and we made every effort to recruit White faculty from that list. [30] But we have never had a problem recruiting White faculty. The fact of the matter is I think by whatever definition we might consider a faculty to be integrated we certainly would meet that. I think we have approximately 30 to 35 percent, maybe even higher White faculty on our campus at this time.

Q. And how long have you had that racial composition among your faculty?

A. Oh, I suspect as far as I was aware of numbers being kept in that—for the day school faculty I have not —was not involved in that prior to '84, and even though I was a member of the administration—

Q. Yes, sir.

A. —from '72 to '84, I was dealing primarily with the evening college and was not involved in the recruitment of White faculty for either—for the day school or White students for the day school.

[1] UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300

Section "A"

UNITED STATES OF AMERICA

versus

STATE OF LOUISIANA, *et al.*

VOLUME II

CONTINUATION OF THE DEPOSITION OF DR. DOLORES R. SPIKES, 1315 Balsam Avenue, Baton Rouge, Louisiana 70807, taken before Cindy K. Tregre, Certified Shorthand Reporter in and for the State of Louisiana, taken in the Law Offices of Bronfin, Heller, Steinberg & Berins, Suite 2500, 650 Poydras Street, New Orleans, Louisiana, commencing on Tuesday, the 28th day of February, 1989.

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In and for the State of Louisiana

* * * *

[79] possibility I don't know. It just seems that it ought to—that it would reach whatever magnitude the court would desire.

Q. Well, Let's not talk about the magnitude the court would desire for a moment. Let's approach it a little differently.

A. All right.

Q. Let me ask you as an educator do you have an opinion as to what percentage of White students at Southern University at Baton Rouge, as to what percentage would constitute a White presence on that campus that would result in the kind of educational benefits that one would expect from integration?

A. I think that over a period of time, I don't think there's going to be instant integration by any of these means, I think that over a period of time we could reasonably expect somewhere between 20 to 30 percent White students on the Black colleges— [80] college campuses, and I—

Q. What period—

A. I may be talking about somewhere around 15 to 20 years' time for that to occur.

Q. And do you think that that level of desegregation, not in terms of a legal standard but in terms of an educational standard would be—

A. In terms of an educational standard?

Q. Yes, ma'am.

A. Yes, I think so.

Q. Do you have a view as an educational matter, not as a legal matter, as to what an adequate percentage of Black students would be at the predominantly White institutions?

A. I think we've looked at the initial figures somewhere which have shown that you may expect, given the number of White institutions in the state, the pool from which to draw that one could reasonably—depending upon [81] the location of the institution, expect from—anywhere from 15 percent Black on up to something even

greater in the New Orleans area I guess, but I think as a minimum somewhere around 15 percent.

Q. I take it, Dr. Spikes, and correct me if I'm wrong, that you've never been involved in the transfer of an academic program; is that correct, from one institution to another?

A. That's correct.

Q. You note at Page 20 of your report for fall semester 1988 40 other race students applied for academic scholarships and that only 17 could be awarded because of limited funds. Did you—in fall of 1988 did you expend all the money available to you at Southern University for other race scholarships?

A. As far as I recollect, yes.

Q. When you call it other race academic scholarships was there any—are these scholarships awarded strictly

* * * *

[State of Louisiana Post-Trial Memorandum
Omitted in Printing]

Attachment 1

COMMENTARY

The Virginia-Pilot
THE LEDGER-STAR
12/10/78

DAVID TATEL: HEW's VOICE IN COLLEGE CRISIS

David S. Tatel, 38, is the director of the Office for Civil Rights of the U.S. Department of Health, Education, and Welfare. He is responsible for federal civil rights policy involving minorities and the handicapped.

OCR oversees compliance with the desegregation rulings of the federal courts in a nine-year-old case generally known today as Adams vs. Califano, involved are federal efforts to desegregate state-operated colleges and universities in six Southern states, including Virginia and North Carolina.

The case in Virginia has reached a critical stage in which Tatel and his immediate superior, HEW Secretary Joseph A. Califano have threatened to begin to cut off the flow of federal money if duplication of nine programs is not ended at predominantly black Norfolk State College and predominantly white Old Dominion University. The deadline is Jan. 6. A similar situation is developing in North Carolina.

For the last two years, Tatel has been one of the most inaccessible of federal officials. The following interview, conducted in Tatel's Washington office Nov. 29 with Virginia-Pilot education writer Jeff Brown, is the first extensive public comment by Tatel on the Virginia desegregation crisis.

Q & A

Brown: I want to start out just talking about desegregation in general in 1978. What is the purpose of desegregation now? It seems to me that years ago the purpose was to break down laws that were obviously intended to segregate. How has that changed?

Tatel: The courts have established two requirements in the desegregation process. The first is to eliminate the actual discriminatory conduct. In Virginia and these other states, that's the law, state law, that required blacks to go to black schools and whites to go to white schools.

The second part of the requirement is to eliminate the vestiges of the dual system. That is, the effects of the past discrimination. That's what we're dealing with now. What the courts have said is that many of those effects still remain in the form of systems of higher education that have a large number of predominantly white schools and several predominantly black schools. There are other effects that the courts have found. Like, for example, that the schools that were the black schools in the former dual system are underfunded, have inadequate resources, inadequate physical plants, that the percentage of blacks graduating from the high schools in this state and entering the state colleges are lower than the percentage of whites.

Q. Is there any sense of how long a process this is going to take?

A. Well, it should have been over years ago. . . . The plans we're now negotiating are five-year plans. And we think that if the plans are acceptable and if the states fulfill their commitments the process should be over in five years.

Q. In Norfolk the people, the blacks at Norfolk State, are * * * that the duplication of programs be dropped. Who is being helped if the blacks are opposing this?

A. Well, remember now, we're not talking about dropping programs, we're talking about two things for the blacks school. One, giving it new programs, which the

state has already agreed to do. And secondly, giving it essentially a monopoly in the Tidewater area on some of the duplicated courses it now offers.

So although it can drop one course it will be given the monopoly on another course, which would presumably be larger as a result. So, as a result, the institution's strengthened and desegregated. And that's the purpose of the whole process.

Q. Why push so hard to do that if the blacks are opposed to it?

A. I don't believe that blacks are opposed to it, if it's done properly. Remember, the lawsuit that we're acting under was brought by a black organization. Most of the black leaders I've spoken to support the effort.

Q. Locally or nationally?

A. Both. And you saw the NAACP director in the Tidewater area supports the effort. The purpose of it is to desegregate the institutions. And I'm convinced if it's done properly both white and black educators will support the process.

Q. Do you think the fear at the black institutions is partly due to the history that whenever something has been taken it's never been replaced adequately? Is there more assurance now that will guarantee that something will not be taken away and a vacuum left?

A. * * * institutions have a legitimate reason to be worried. When elementary and secondary schools were desegregated it was the blacks who lost their jobs. The black teachers and the black administrators. And the plans we're negotiating with the states insure that if there is going to be a reduction, which nobody would expect—I mean there is no reason for it—that it would be done nondiscriminatorily. The plans have lots of protections for black administrators and black teachers. And the whole purpose of these plans is to protect black institutions.

[Picture Omitted in Printing]

Q. Blacks have talked about the need to keep the black school primarily black as part of the effort to retain the black identity. There was a story in the Chronicle of Higher Education this week about a predominantly black school in Florida where they're worried that the white enrollment is going to increase to such a point that it's going to dilute the character of the place. What is the place of black identity in an institution, and what in your mind does the black identity mean when that term is used?

A. Well, what it means to us is the preservation of the institution. As an integrated institution you can preserve the white identity of a white institution and still have it integrated. And there's no logical reason why you shouldn't be able to preserve the identity of a black institution and have it integrated. This is not a racial-balance law that we're applying. We're not insisting, and probably there never will be, blacks and whites evenly distributed in every institution in the state.

Q. Is that a goal?

A. No, it's not. That's what I said. This is not a racial balance thing. The purpose of it is to have enough blacks attending the white schools and enough whites attending the black schools so that we can conclude they are in fact integrated.

Q. Is there any evidence beyond the discrepancy in enrollment of the two institutions that there is discrimination in admissions policies?

A. Discrimination now?

Q. Now.

A. No. All we're talking about, and this has been made clear all along, is the effects of past discrimination, that is the former state laws that limited attendance to these institutions on the basis of race, and that effect has continued into the 1970s.

Q. Blacks like Harrison Wilson, president of Norfolk State, argue that that point of view indicates that Office for Civil Rights is out of touch with the present feeling

in the black community. His argument is that though the historical reasons for Norfolk State's founding were wrong the present situation is not and that historical reasons aren't relevant to the present situation.

A. Well, they are relevant. The courts have told us they're relevant. We're dealing with a system of higher education that was once segregated. Brown vs. Board of Education (the 1954 Supreme Court ruling that struck down the separate-but-equal principle of public schooling) requires that it be segregated. And that's the overriding concern. We're only dealing with public black colleges. We are not talking about the probably 100 or 150 private black schools throughout the country that aren't affected by this. But these public black institutions are under the same obligation to desegregate as are the white institutions that are members of the same system.

Q. If these two schools comply within the next month or so and each drops some programs to eliminate the duplication is there any guarantee that the plaintiffs won't reactivate the case or that Office for Civil Rights won't come back with some other requirement?

A. There's no guarantee that the plaintiffs won't challenge the plans but there is a guarantee, that if we accept the plan we'll defend it with the state. And I mean what happened a few years ago where the department did not defend the plan will not happen. If we accept them, we'll defend them. But I can't guarantee that the plaintiffs won't challenge them.

Q. Has the Office for Civil Rights made any survey itself on the campuses and what information is used to determine that there are vestiges of segregation there?

A. Well, a couple of things. First, the court already has held that the 95 percent black colleges and 95 percent white colleges are vestiges of the former system. So it's a matter of law that we have to deal with. We have the statistics which demonstrate that. And the extensive duplication in programs between the two institutions are vestiges of that. Remember that this duplication was

created primarily to make sure that blacks and whites attended different schools. And that's the vestige that has to be eliminated.

Q. Is there any evidence of present racism in the operation of either of the schools?

A. No. I mean I already told you, we have no indication that there's current discrimination. That's not what this is all about. This is all about the effects of past discrimination. There are, however, factors that exist that affect students' judgment on where they attend school. And whites will continue to attend the white schools and blacks will continue to attend black schools so long as those schools offer identical programs. Our objective is to try to specialize the two institutions on grounds other than race so that whites would have a reason to pick the black school and blacks would have a reason to pick the white school.

Q. Why is it important that blacks and whites pick their schools on some basis other than race?

A. In order to integrate the schools. I mean there's nothing more important than the principle set forth in Brown that former segregated institutions be desegregated.

Q. The argument being made in Norfolk now is that there is free choice of which school to go to, that admissions are not discriminatory, and that the original intent of civil rights was to give people a choice to go wherever they wanted.

[Picture Omitted in Printing]

A. But as I said at the beginning, the courts have said you have got to do two things. You have to first stop discriminating but you have to also eliminate the effects of past discrimination. And those effects still remain in the Tidewater area. I'll give you an example. In elementary and secondary schools the first step the South took after Brown was freedom of choice. All the Southern states adopted freedom of choice plans. They

said that we have now stopped requiring blacks to attend black schools and whites to attend white schools, and they can go anywhere they want. And that operated for several years and it went back to the Supreme Court and the Supreme Court said that's not enough. They said the state has an obligation to take affirmative steps to dismantle the former dual system. It has to reassign students. Freedom of choice is not enough. Now, in higher education we can't reassign students. We have to find other ways to influence their choice of institutions. And we are now doing, trying to do, in higher education what the Supreme Court did when it said that freedom of choice was unacceptable.

Q. What's your assessment in general of Virginia's success or failure in integrating higher education?

A. The change was dramatic when Gov. Dalton was elected and we were able, for the first time, to negotiate an acceptable plan. That's a good plan. It's got strong goals, it requires a substantial increase of black enrollment in the white schools. Old Dominion itself has a good affirmative action plan in hiring and it's basically a good desegregation plan. The only remaining issue is the question of the relationship between ODU and Norfolk State. And if we can solve that plus several other technical problems I mentioned to the governor, we'll have an acceptable plan. So the program has really been quite good.

Q. How does the situation in Norfolk fit into a bigger picture of the other states that are still involved in these issues as well. Is there a precedent that needs to be set in Norfolk? Will the resolution of the situation here affect disputes elsewhere?

A. Every state's different. I mean, and that's important. And we've tried to fashion plans that conform to the differences in each state. But there are some similarities. For example, in Georgia, in Savannah, there is a black school and a white school several miles apart. Savannah State is the black school. Armstrong State is

the white school. The board of regents there has agreed to close teacher education at the black school and transfer it to the white school. Close the business administration at the white school and transfer it to the black school. Which is what we're seeking in the Tidewater area. Something like that. So the precedent's already been set. The board of regents in Georgia approved that plan and submitted it to us. There are other situations like that. That's where it's been done. There are similar situations: like in Florida there's FAWU (Florida A&M University) and Florida State in the same city and in North Carolina there are two clusters of black and white institutions.

Q. The way I visualize what's happening is that at the very beginning you'e got the plaintiffs who are forcing the courts to make decisions. The courts then direct orders at HEW and the Office for Civil Rights which then negotiates with the state. The state then discusses it with its individual institutions. If the plaintiff, the NAACP, for example, were to meet directly with officials at the two institutions and agreed with them that these programs are not unnecessarily duplicated and that neither school should have to dismantle any programs, would there be any way that could be accepted by Office for Civil Rights?

A. No. It couldn't be because our responsibility under Title VI is what the courts have said it is, that is to dismantle these former dual systems. We issued standards by which plans would be measured. These standards require the elimination of educationally unnecessary program duplication and we couldn't accept plans that didn't do that without violating our own standards in those and thus the court order. Remember that HEW is in this position because it failed to enforce this law in the past. We're not doing it reluctantly. We're doing it because it's our responsibility.

Q. Do you foresee any circumstances under which HEW would press for a merger between the two schools?

A. No. I've heard discussions of a possible merger but we have not pressed for it in the ? ? as a possibility for a criteria.

Q. If the two were to merge, would that reduce the possibility that OCR would come in again sometime down the road a year or two or later on with other complaints about the situation. Would that be a panacea merger?

A. I don't know. I can't answer the question. It's two ways to desegregate. One is by eliminating program duplication and enhancing the black school. Another possibility would be merger, if it's done properly, and in accordance with Judge (John H.) Pratt's court order. But we really have not discussed that.

Q. There is fear now in Norfolk that the effect of all this in the last few months and now especially, is to put these two institutions at each other's throats. Neither one wants to drop any programs. Norfolk State may argue that if anyone is to drop any programs, given the history of inequitable funding, that all dropping should be done at ODU. Suppose they made an argument like that, would OCR support a position like that or would OCR even get involved?

A. OCR wouldn't get involved at all. Our position is that the program duplication has to be eliminated but how it's done is left up to the state and the individual institutions. If they can work out a way to do it that that satisfies them it will be acceptable to us.

Q. But you're not going to mediate that decision?

A. I've met with both presidents and I've offered to meet with them again if they think that would be helpful. . . .

Q. Would OCR ever accept merger, and under what kinds of circumstances?

A. As I said earlier we have not been pushing merger. We've discussed it and we've been concentrating on program duplication. But if the state submitted a proposal that had a merger we would accept it under

certain circumstances. We could accept it, for example, if the white institution were merged into the black institution. We would also accept it if the two institutions were merged and a new institution resulted. And if the provision were made to insure that black administrators and faculty were protected in the resulting institution. We would not accept it under the court order if the black institution were merged into the white institution.

Q. Are there any options, any ways of resolving this situation short of somebody dropping some program?

A. We've talked about the possibility of specializing some of the programs. For example, they might choose to drop some program and specialize others. You might, for example, be able to take a particular program, let's just take business administration for example, and continue it on both campuses but specialize it so that one kind of business administration were taught at one institution and another at the other institution. And if they were specialized enough to really differentiate them so that students would select institutions based on those different programs then it would be something we could consider acceptable.

Q. There's concerns, I think, by those who portray themselves as realists in Norfolk, including the blacks, that if the programs were specialized to that extent or if each school dropped half its programs that the black students who would have gone to Norfolk State to get those programs in the next few years, who would now not be able to get them except at ODU would not go to ODU. They would continue to go to Norfolk State and major in something else or they wouldn't go to college at all.

A. Well, I think that there are obviously students who will continue to select the institutions because it's Norfolk State or because it's ODU. But there are also students who graduate from high school who know they want to be teachers, who know they want to be businessmen or women, who will select their institution based on

the program. We're not seeking to have all the students move, we're just trying to have enough students move to desegregate these institutions.

Q. There's also talk at Norfolk State that what that college provides is an atmosphere that's more understanding of the cultural background of the black students than what they would find at the predominantly white school with a mainly white faculty.

And that this is what has enabled Norfolk State to bring students to a level at graduation that they wouldn't be able to achieve in a predominantly white school.

A. Nothing would change here. Norfolk State would still have a faculty predominantly black faculty and a predominantly black student body. There would just be a significantly larger number of white students on the campus, just as there are a growing number of blacks on the white campus. The atmosphere would continue except that they wouldn't be essentially in completely black and white institutions.

Q. Is there a guideline for what those percentages should be?

A. No. We know that if you give the students the reasons to select these institutions that a significantly larger number of whites will attend the black school. We don't know what that number will be. We've been told by the courts that it has to be larger than what it is and our experience in other states is that the percentage of both blacks and whites on the other campuses will continue to grow.

Q. Is there evidence, now, in present state legislation or education decisions by the Council of Higher Education or the secretary of education or any others that their intent is to segregate, that their motivations are racist?

A. No. None at all. But, as I said, the question is the effects of past discrimination and we're under a legal obligation to deal with those, and those effects are, as I said, racially identifiable schools, black schools that are

weak and underfunded, poor percentage of blacks on the white institutions, insufficient percentage of blacks teaching at the white institutions—all of those are the effects that the past discrimination. And these plans deal with all this, not just the black institutions.

Q. What is the place of the black institution in the society now and in the ftuure?

A. I think private black institutions just as private predominantly white institutions have an important role to play and they may continue to have a role to play in public education. As I said, we're not applying a racial balance law, we're not looking to have every college and university in the Virginia system 15 percent black and 25 percent white. Extensive variations can be permitted. But what we have to eliminate are the overwhelmingly black and overwhelmingly white institutions. You still will have predominantly black and predominantly white institutions in the system.

Q. But there is a big difference between a private and a publicly supported institution?

A. Oh, sure. There is a big difference under the Constitution, in terms of their obligation to desegregate. Because the black private institutions were never part of a system that was formally, legally segregated.

Q. The question of money now, and the deferral or cutoff of funds: what kind of funds are immediately jeopardized if Virginia doesn't comply by the end of 45 days?

A. While we're still trying to work this out I would rather not go into the details of it. But as I said in the letter to the governor we will defer action—defer not cut off—action on grants that we determine would aggravate the segregated conditions in the system. For example, we would defer action, or grant from a white institution to support a program that is duplicated at a completely black institution.

Q. As a last question, you know there is this sense down there in Norfolk that's pretty universally held, that

HEW is up here occupying this monolith and doesn't have direct contact with the situation down there and has to make decisions in such a distant way—it's a whole impersonal kind of government intervention. Who's being helped when nobody's asking for it?

A. There's a couple of answers to that. First, our responsibility is of course to Title VI. And our sense is that is generally supported by the public. Secondly we do know a lot about these systems. We get a great deal of data from them, we visit with them. I've met with the leaders of these systems time and time again and our staff is very familiar with the programs. And, third, and maybe the most important thing, is that we have set standards for plans and asked the states themselves to develop the plans so that they can conform to the unique nature of each state. We've avoided fashioning uniform plans for every state. If you look at the plans, they're all very different. Each state has come up with a very different plan which fits its own needs and its own circumstances. And our only insistence is that those plans conform with the over-all standards that we issued. And that way we balance, we think, our responsibility to enforce the law and our equally strong responsibility to interfere as little as possible in local and state educational decisions.

Q. Just one more question. Would the situation be like this, would the Office for Civil Rights treat the situation in the same way if it weren't under a court order. How is it the process of this court order—sort of the driving force, how's that affecting us down the line, down at the receiving end where we are? Is that adding an impersonal element to it?

A. No. It's really not. I mean the reason the courts are in it is that HEW failed in its responsibility 10 years ago. The court is now saying to HEW, "Get the job done and do it pursuant to published standards. That's the way we should have behaved 10 years ago. The problem now is that it's 10 years later and it's difficult for the

public to understand. I don't think there are any basic differences in how we behave because of the court order other than the fact that we are now fulfilling our responsibilities.

Q. Have there been any new policy decisions by Califano or Carter that are affecting this situation?

A. No.

Q. When the 45-day letter is sent how high up the line is that cleared? Is Califano involved? Is the President involved?

A. No. (Not the President). That's decided by the department—the secretary (Califano) and I decide.

ANNUAL REPORT

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

1974

TABLE 58

THREE-JUDGE COURT HEARINGS BY NATURE OF SUIT
FISCAL YEARS 1963-74

Fiscal year	Total	Review of ICC orders	Civil Rights	Reapportionment	All other
1963	129	67	19	16	27
1964	119	50	21	18	30
1965	147	60	35	17	35
1966	162	72	40	28	22
1967	171	64	55	10	42
1968	179	51	55	6	67
1969	215	64	81	1	69
1970	291	42	162	8	79
1971	318	41	176	2	99
1972	310	52	166	32	60
1973	320	52	183	7	78
1974	249	51	171	8	19
Percent change 1974 over 1973	—22.2	—1.9	—6.6	14.3	—75.6

ANNUAL REPORT
OF THE
DIRECTOR OF THE ADMINISTRATIVE OFFICE
OF THE
UNITED STATES COURTS
1988

Table S-22

Three-Judge District Court Hearings By Nature of Suit
1983 Through 1988

Nature of Suit	1983	1984	1985	1986	1987	1988
Total	27	35	10	19	20	15
Reapportionment [1]	9	17	2	1	1	5
Civil Rights	16	16	8	15	19	10
Discrimination	1	1	—	—	—	—
Education	—	—	—	—	—	1
Penal code and prisoner petitions	1	—	—	—	—	—
Voting and election laws [1]	14	15	8	15	17	8
Welfare	—	—	—	—	1	—
Constitutionality of other state statutes	—	—	—	—	1	1
All Other	2	2	—	3	—	—

[1] Two voting rights cases in 1986, 1987 and 1988 were considered on briefs without hearing; in 1988 one reapportionment case was considered on briefs.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

CV479-251

MARSHA ARTIS, *et al.*,
Plaintiffs

vs.

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, *et al.*,
Defendants

ORDER

[Filed Feb. 2, 1981]

This case is before the Court pursuant to 42 U.S.C. § 1983, 28 U.S.C. § 1343(3) and (4) and other civil rights statutes. Suit was originally filed August 7, 1979, claiming that the defendant Board of Regents operated a dual system of public colleges in Savannah, Georgia, in violation of the Fourteenth Amendment. Plaintiffs then sought a preliminary injunction to stop implementation of a limited desegregation plan which had been approved by the Department of Health, Education and Welfare, so that a complete merger of the two institutions, Savannah State College (SSC) and Armstrong State College (ASC), could be achieved. A hearing was held on this injunction August 24, 1979. At this hearing plaintiffs announced dismissal of HEW as a party de-

fendant. Evidence on the racial history and composition of the two institutions was also received.

After review of this evidence, the Court concluded in its Order of September 4, 1979, that plaintiffs had failed to demonstrate either irreparable injury or a substantial balance of harms in their favor. Accordingly, plaintiffs' motion was denied.

Subsequently, this Court has entertained additional evidence and argument particularly at a bench trial held November 12, 1980. At this proceeding, plaintiffs indicated that they had abandoned their demand for a complete merger of SSC and ASC. Instead, plaintiffs argued that this Court should promote desegregation of both schools by requiring a total end to duplication in their program offerings. Plaintiffs also argued that this remedy was demanded by the apparent failure of the HEW plan to achieve its objectives. This plan centralized all business administration courses at SSC and education courses at ASC.

After careful consideration of available evidence and argument, I have concluded that there has been no showing that the current racial composition of the two institutions is the result of constitutional violations by the defendants and not the individual choices of students. In view of this determination, the Court finds that no basis exists for ordering any of the relief here sought. The Court further concludes that, even if certain actions of the defendants did violate constitutional mandates, these actions have had only minimal impact on racial balance at the two schools and have been adequately remedied by the defendants' more recent policies. The reasons for these determinations are developed more fully in the following materials, denominated Findings of Fact and Conclusions of Law. However, should the content of any item be at odds with its classification, content shall be controlling.

Findings of Fact [1]

1. Armstrong State College and Savannah State College are four-year institutions operated by the defendant Board of Regents in Chatham County, Georgia.

2. SSC was originally named Georgia State Industrial College for colored youths. It was created by the Georgia General Assembly on November 26, 1890 for purposes suggested by its name. The University of Georgia and the School for Colored Students jointly operated the school initially in Athens, Georgia. In 1891, it was moved to its present site in Thunderbolt, Chatham County, Georgia. In 1932, the college was renamed Georgia State College and incorporated under the Board of Regents of the University System of Georgia. It was again renamed in 1950, when it became Savannah State College.

3. SSC has remained predominantly black throughout its history. The mean enrollment (full and parttime students) for the 1978-79 academic year was 1,949 students. Of these, 1,813 (93%) were black. More recent statistics reflect a higher percentage of white and foreign students, but blacks still constitute about 88% of SSC enrollment.

4. Armstrong State College was first opened in 1935 as a junior college. The City of Savannah operated the institution until 1959 when it became a part of the University System of Georgia. ASC was elevated to four-year status by the Board of Regents in 1964.

5. Armstrong has been and remains today, a predominantly white college. No blacks were admitted until

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[1] Finding of Fact 1-7 are drawn largely from the Court's Order of September 4, 1979. This Order was, of course, based upon evidence placed before the Court at the August 24, 1979 hearing. The remaining portions are based on materials and testimony from the bench trial conducted November 12, 1980. However, in any event, there is little dispute as to facts in this case.

1963. Average quarterly enrollment in the 1978-79 academic year was 2,895 students, of which about 87% were white. The most recent statistics available to the Court indicate that white enrollment is over 83%.

6. In July, 1977, HEW informed the defendant Regents that a desegregation plan accepted in 1974 had been rejected by the District Court of the District of Columbia. *Adams v. Califano*, 430 F. Supp. 118 (1977). Responding to this development, HEW defined new criteria for desegregation of higher education in Georgia as well as several other states. These criteria emphasized (1) use of comprehensive, coordinated statewide plans, (2) development of specific funding commitments and project goals and (3) avoidance of any reduction in blacks' educational opportunities or the status of black colleges. In addition, the revised HEW criteria emphasized elimination of unnecessary duplicative programs among black and white institutions; giving black institutions priority in placement of new degree program; and increased black utilization of higher education in the affected states.

7. In response to these criteria, the Board of Regents developed a revised desegregation plan for ASC and SSC. This plan was submitted to HEW on October 19, 1978, and approved by it in February, 1979. Under its provisions, ASC and SSC are expected to set up a joint continuing education program for the local population. The plan also calls for elimination of duplicative courses by centralization of the business administration program at SSC, and a similar transfer of all teacher education courses to ASC. In conjunction with these changes, the plan provides for faculty transfers, maintenance of existing funding levels and student scholarships, and free shuttle bussing between the two institutions. The plan provides further for enhancement of SSC by addition of several new degree programs and substantial capital expenditures to improve the physical plant.

8. This plan is only one of many efforts made at least since 1971 to change the clear racial identities of the two institutions. Joint degree programs were first discussed in 1969 and in fact initiated in 1971. SSC has taken special steps to recruit white faculty. Attempts have also been made to integrate graduate programs. These efforts have occurred through the active cooperation of administrators at the two institutions. There has been no evidence presented which suggests resistance to these steps at either institution. There has been no evidence that any student has been denied access to either institution on grounds of race, at least since the middle 1960s.

9. It is apparent from the statistics on racial composition presented above that the joint efforts of SSC and ASC officials had comparatively little impact on the nature of the two institutions. Testimony presented at trial confirmed that both institutions remain clearly identifiable racially and that neither appears likely to achieve substantial racial balance in the foreseeable future. This conclusion may be particularly applicable where program duplication allows students to choose on both racial and educational grounds. But, in all events, projections under the HEW plan for increased minority enrollment are not being met. Even when duplication has been ended, most students have not chosen to follow their educational interests to a school where they would be in a racial minority. See CL 5.

10. The lack of change in the racial identities of ASC and SSC may be due in some part to the establishment of duplicative programs, notably in social work and criminal justice at the two institutions. Similarly, racially-based decisions by students may be facilitated by the availability of Georgia Southern College (GSC) which is predominantly white and only about sixty miles from Savannah.

However, it appears that the defendants have made substantial efforts to defeat any segregative impact of the

existence of duplicative programs. As preparatory steps to eventual merger of the two institutions, joint programs have been developed between the two colleges in a number of areas including criminal justice and social work. Furthermore, there is no reason to believe that any action taken with respect to GSC has been intended to do more than provide for actual increases in enrollment which have developed out of individual student choices.

11. The primary determinants of the racial character of ASC and SSC are the individual choices of potential students. These decisions are based upon factors such as peer pressure, family ties, as well as educational and athletic opportunities. As was noted above, these decisions are not easily changed by the actions of school officials or development of programs such as the HEW-mandated plan. In fact, Dr. Prince Jackson, former president of SSC and a witness for the plaintiffs at the preliminary injunction hearing testified as follows:

> [F]or students to go to a school in a true society (an integrated school) you have to reduce the number of choices that they have. The reason we have the black and white thing is because students do have choices so we have to reduce the number of choices that they have.

Tr. 44. Thus, the evidence is clear that the overwhelming reason for the racial imbalances plaintiffs complain of is the individual decisions of students who are, after all, free to attend or not attend college where and when they choose. It is not to be attributed to any active effort to create or maintain segregation by the defendants. It is not likely to be altered significantly by the steps plaintiffs seek or any measures which leave students free to "vote with their feet."

Conclusions of Law

1. This Court has jurisdiction over the present case pursuant to 42 U.S.C. § 1983, 28 U.S.C. § 1343(3) and (4) and other civil rights statutes.

2. Where a state has maintained a dual system of education, it has a duty to "disestablish" this system "root and branch." *Green v. School Board of New Kent County*, 391 U.S. 430, 437-38 (1968). However, before any judicial remedy may be imposed, a currently existing constitutional violation must be shown. In the absence of such a violation, no judicial remedy may be imposed. *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 419-420 (1977); *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 434 (1976); *Milliken v. Bradley*, 418 U.S. 717, 738 (1974).

3. The mere existence of racial imbalance, however pronounced, is not a constitutional violation. *Brinkman, supra*, at 413, 417. Furthermore, the fact that racial imbalances were originally created or promoted by official acts in the distant past does not mean that the continued existence of such imbalance is attributable to these official acts. *Armour v. Nix*, U.S.D.C., N.D.Ga., No. 16780, Order of September 24, 1979, at 20-21.

In the present case, it appears that the overwhelming reason for continued racial imbalances at ASC and SSC is the free choice of students based upon a myriad of factors, some related to educational considerations, others of a wholly personal nature. FF 11.

4. There is authority for the proposition that, where present constitutional violations are found, a state must carry out a complete merger of institutions of higher learning. See *Geier v. Blanton*, 427 F. Supp. 644 (M.D. Tenn. 1977), *Aff'd*, 597 F.2d 1056 (6th Cir. 1979). However, in this Circuit, a state's duty to "disestablish" segregated colleges has been defined in far narrower terms:

> Higher education is neither free nor compulsory. Students choose which, if any, institution they attend. In making that choice they face a full range of diversity in goals, facilities, equipment, course

> offerings, teacher training and salaries, and living arrangements, perhaps only to mention a few.

Alabama State Teachers Association v. Alabama Public School and College Authority, 289 F. Supp. 784, 788 (M.D. Ala. 1967), *Aff'd* 393 U.S. 400 (1969).

> We conclude, therefore, that as long as the State and particular institutions are dealing with admissions, faculty and staff in good faith the basic requirement of the affirmative duty to dismantel the dual system on the college level, to the extent that the system may be based upon racial considerations, is satisfied.

289 F. Supp. at 789-790. Thus, the defendants in this case are at most chargeable with a duty to act in good faith with respect to operation of ASC and SSC. They are not constitutionally required to take affirmative action to destroy the racial identities of the two institutions, even to the extent that they are chargeable with direct contribution to that imbalance.

5. Broad relief of the suit plaintiffs seek here cannot be based on any mere *de minimis* or cumulative constitutional violations. *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 413 (1977). The actions of the defendant must be a "substantial cause" of the segregation complained of. *Milliken v. Bradley*, 418 U.S. 717, 744-45 (1974).

Under the facts now before the Court, it cannot be concluded that any action of the defendants since about 1965 has contributed substantially to racial imbalances at ASC and SSC. Even if racial intent is ascribed to establishment of social work and criminal justice programs at both institutions, the impact of these decisions would appear to be minor. Only seventy-three degrees in social work were conferred by Armstrong between 1972 and 1977. Of these, six went to blacks. Enrollment in the criminal justice program is apparently higher, but

still less than 10% of students at the two schools are involved. Defendants' Exhibit 2, August 24, 1979 (letter of December 15, 1977 to HEW office for Civil Rights, at p. 15). Furthermore, the minority percentages in these programs appear to be about equal to that in the overall student populations. *Id.* Thus, it is difficult to see how either has added to segregation of these institutions.

It is similarly difficult to see how increased funding at GSC could have had any substantial impact on segregation at Armstrong and Savannah State. The appropriations plaintiffs point to concern only the 1980 fiscal year. Of course, the racial imbalances complained of are of much larger duration. Moreover, they have persisted for many years in which there is no claim that any action with respect to Georgia Southern was involved.

Furthermore, plaintiffs' own evidence suggests strongly that the presence or absence of duplicative programs has only modest impact on integration in any event. HEW projections indicated that the switch of business and education courses would bring approximately 500 blacks to ASC and 500 whites to SSC. In fact, plaintiffs conclude that only about 114 whites and 85 blacks transferred. Thus, plaintiffs acknowledge that over 80% of affected students simply went elsewhere. It appears then that the defendants have at best very limited capacity to alter student enrollment decisions, even when they follow the policies plaintiffs seek here.

6. Even if the Court accepts *arguendo* the proposition that the Board of Regents have engaged in constitutional violations having substantial present effects, the actions of the defendants in adopting the HEW plan clearly meet the standards of good faith affirmative action discussed in *Alabama State Teachers Association*, *supra*. The desirability of eliminating duplicative programs has been accepted and the process, in fact, has begun. Cooperation between the institutions has developed. There is every likelihood that these policies will be pursued further in

view of the quite effective financial pressure which HEW exerts over the defendants, if for no other reason. While this Court finds no constitutional violation which would support such measures, affirmative action in this context is certainly not impermissible. *Regents of the University System of California v. Bakke*, 438 U.S. 265 (1978). These steps clearly move SSC and ASC in precisely the direction plaintiffs here seek.

Discussion

This case presents the Court with several difficult questions of law and fact. There is as yet no settled answer to the problem of how much principles developed with respect to segregation in elementary and secondary education may be applied to colleges like Armstrong and Savannah State. Furthermore, the Court can find no easy method for determining the motivations of the defendants in their various official acts, many of which occurred years ago. Nor can the Court see any simple or definitive way to determine the basis for the educational choices of the many students whose conduct is the basic subject matter of this litigation.

However, based on the limited evidence and precedent available in this case, I have concluded that the overwhelming reason for the continued racial identities of ASC and SSC is the individual choice of students with respect to institutions which are neither free nor compulsory. Facts now before the Court suggest that official action has at best only limited impact on choices, which appear to reflect notions about the two schools that are of long standing and considerable durability. The Court further concludes that the overwhelming weight of official action has been toward increasing, not retarding, "disestablishment." To the extent that limited opposite motives or impacts might be seen, it appears that there has been no substantial contribution to persistent racial imbalances at the two schools. Furthermore, it appears

that the defendants have largely, if not completely, abandoned such policies and that they will continue to move in this direction in future years.

This Court is aware of the existence of contrary authority with respect to the legal duty of states which have maintained dual systems of higher education. See *Adams v. Richardson*, 356 F. Supp. 92 (D.C.D.C. 1973), *aff'd* 480 F.2d 1156 (D.C.App. 1973). See also *Adams v. Califano*, 430 F. Supp. 118 (D.C.D.C. 1977); *Blanton*, *supra*. These cases apply concepts developed with respect to elementary and secondary directly to colleges, without reference to the many significant differences which *Alabama State Teacher's Association*, *supra*, finds determinative of the state's duty to "disestablish." In this case I have, of course, followed the *Alabama* reasoning. But, it should be re-emphasized that the plan in question was approved by HEW. Thus, there is no real, practical conflict in the direction to which the defendants are committed and the more demanding requirements of *Adams* which plaintiffs here seem to endorse. Furthermore, it is likely that the problems which plaintiffs point to in this plan will bring further attention from HEW (now HHS) and further responses from the defendants. The Court will look with interest upon these developments. But, under present law in the Fifth Circuit, I see no basis for the relief plaintiffs seek. Accordingly, the Court hereby orders that judgment be entered for the defendants.

So Order this 2 day of February, 1981.

/s/ [Illegible]
Judge
United States District Court
Southern District of Georgia

SSPA REPORT II

[pp. 10-106 Omitted in Printing]

LOUISIANA COLLEGES AND UNIVERSITIES
SOURCE: FALL 1988 STATEWIDE STUDENT PROFILE SYSTEM
1987-88 ACT DATA
BY INSTITUTION AND RESIDENCY/CITIZENSHIP

			SOURCE							
			ACT				SSPS			
			RACE				RACE			
			BLACK	OTHER	WHITE	TOTAL	BLACK	OTHER	WHITE	TOTAL
			N	N	N	N	N	N	N	N
INST	STATUS	CON/N								
DELGADO	1. RESIDENT	C	60	35	132	227	448	163	901	1512
		N	8	1	7	16	29	6	36	71
	2. NON-RES U S	N	.	.	.	.	3		5	8
	3. FOREIGN	N	.	.	.	.	4	17	7	28
	TOTAL		68	36	139	243	484	186	949	1619
GRAMBLING	STATUS	CON/N								
	1. RESIDENT	C	101	73	1	175	157	.	5	162
		N	308	130	2	440	458	.	3	461
	2. NON-RES U S	N	.	.	.	.	758	3	.	761
	3. FOREIGN	N	.	.	.	.	4	9	.	13
	TOTAL		409	203	3	615	1377	12	8	1397
LA TECH	STATUS	CON/N								
	1. RESIDENT	C	54	23	295	372	72	128	341	541
		N	105	86	659	850	145	235	669	1049
	2. NON-RES U S	N	.	.	.	.	35	51	172	258
	3. FOREIGN	N	.	.	.	.	.	6	.	6

(CONTINUED)

LOUISIANA COLLEGES AND UNIVERSITIES
SOURCE: FALL 1988 STATEWIDE STUDENT PROFILE SYSTEM
1987-88 ACT DATA
BY INSTITUTION AND RESIDENCY/CITIZENSHIP

			SOURCE							
			ACT				SSPS			
			RACE				RACE			
			BLACK	OTHER	WHITE	TOTAL	BLACK	OTHER	WHITE	TOTAL
			N	N	N	N	N	N	N	N
INST	TOTAL									
LA TECH			159	109	954	1222	252	420	1182	1854
MCNEESE	STATUS	CON/N								
	1. RESIDENT	C	79	321	617	1017	195	20	1222	1427
		N	51	50	114	215	83	7	236	326
	2. NON-RES U S	N	.	.	.	.	21	5	62	88
	3. FOREIGN	N	.	.	.	.	.	18	.	18
	TOTAL		130	371	731	1232	289	50	1520	1859
NICHOLLS	STATUS	CON/N								
	1. RESIDENT	C	108	102	830	1040	104	24	983	1111
		N	69	22	214	305	77	5	251	333
	2. NON-RES U S	N	.	.	.	.	4	1	21	26
	3. FOREIGN	N	.	.	.	.	.	2	.	2
	TOTAL		177	124	1044	1345	185	32	1255	1472
NORTHEAST	STATUS	CON/N								
	1. RESIDENT	C	88	70	572	730	130	18	789	937
		N	132	57	465	654	147	11	627	785
	2. NON-RES U S	N	.	.	.	.	19	3	117	139

(CONTINUED)

LOUISIANA COLLEGES AND UNIVERSITIES
SOURCE: FALL 1988 STATEWIDE STUDENT PROFILE SYSTEM
1987-88 ACT DATA
BY INSTITUTION AND RESIDENCY/CITIZENSHIP

			SOURCE							
			ACT				SSPS			
			RACE				RACE			
			BLACK	OTHER	WHITE	TOTAL	BLACK	OTHER	WHITE	TOTAL
			N	N	N	N	N	N	N	N
INST	STATUS	CON/N								
NORTHEAST	3. FOREIGN	N	.	.	.	.	.	18	.	18
	TOTAL		220	427	1037	1384	296	50	1533	1879
NORTHWESTERN	STATUS	CON/N								
	1. RESIDENT	C	67	298	275	640	147	97	569	813
		N	64	260	311	635	110	46	443	599
	2. NON-RES U S	N	.	.	.	.	111	7	53	71
	3. FOREIGN	N	.	.	.	.	.	1	1	2
	TOTAL		131	558	586	1275	268	151	1066	1485
SOUTHEASTERN	STATUS	CON/N								
	1. RESIDENT	C	50	388	731	1169	79	24	1263	1366
		N	34	136	382	552	49	9	653	711
	2. NON-RES U S	N	.	.	.	.	17	3	35	55
	3. FOREIGN	N	.	.	.	.	.	4		4
	TOTAL		84	524	1113	1721	145	40	195	2136
USL	STATUS	CON/N								
	1. RESIDENT	C	132	434	766	1332	272	53	1390	1715
		N	189	130	343	662	342	32	548	922

(CONTINUED)

LOUISIANA COLLEGES AND UNIVERSITIES
SOURCE: FALL 1988 STATEWIDE STUDENT PROFILE SYSTEM
1987-88 ACT DATA
BY INSTITUTION AND RESIDENCY/CITIZENSHIP

			SOURCE							
			ACT				SSPS			
			RACE				RACE			
			BLACK	OTHER	WHITE	TOTAL	BLACK	OTHER	WHITE	TOTAL
			N	N	N	N	N	N	N	N
INST	STATUS	CON/N								
USL	2. NON-RES U S	N	.	.	.	.	19	9	44	72
	3. FOREIGN	N	.	.	.	.	.	29	.	29
	TOTAL		321	564	1109	1994	633	123	1982	2738
LSU-ALEX.	STATUS	CON/N								
	1. RESIDENT	C	21	298	266	583	38	7	399	444
		N	.	11	9	20	2	.	25	27
	2. NON-RES U S	N	.	.	.	.	1	1	10	12
	TOTAL		21	307	275	603	41	8	434	483
LSU A&M	STATUS	CON/N								
	1. RESIDENT	C	56	255	789	1100	61	48	1070	1179
		N	175	391	1563	2129	214	120	1973	2307
	2. NON-RES U S	N	.	.	.	.	39	13	224	276
	3. FOREIGN	N	.	.	.	.	.	44	.	44
	TOTAL		231	646	2352	3229	314	225	3267	3806
LSU-EUNICE	STATUS	CON/N								
	1. RESIDENT	C	7	300	124	431	62	6	443	511
		N	.	28	6	34	4	1	44	49

(CONTINUED)

LOUISIANA COLLEGES AND UNIVERSITIES
SOURCE: FALL 1988 STATEWIDE STUDENT PROFILE SYSTEM
1987-88 ACT DATA
BY INSTITUTION AND RESIDENCY/CITIZENSHIP

			SOURCE							
			ACT				SSPS			
			RACE				RACE			
			BLACK	OTHER	WHITE	TOTAL	BLACK	OTHER	WHITE	TOTAL
			N	N	N	N	N	N	N	N
INST	STATUS	CON/N								
LSU-EUNICE	2. NON-RES U S	N	.	.	.	.	.	.	1	1
	3. FOREIGN	N	.	.	.	.	.	1	.	1
	TOTAL		7	328	130	465	66	8	488	562
LSU-SHREV.	STATUS	CON/N								
	1. RESIDENT	C	25	213	280	518	46	17	518	581
		N	.	7	17	24	2	.	26	28
	2. NON-RES U S	N	.	.	.	.	.	.	9	9
	TOTAL		25	220	297	542	48	17	553	618
UNO	STATUS	CON/N								
	1. RESIDENT	C	388	376	1341	2105	477	187	1548	2212
		N	73	32	93	198	90	12	101	203
	2. NON-RES U S	N	.	.	.	.	7	2	30	39
	3. FOREIGN	N	.	.	.	.	1	19	.	20
	TOTAL		461	408	1434	2303	575	220	1679	2474
SOUTHERN-BR	STATUS	CON/N								
	1. RESIDENT	C	355	226	3	584	732	14	5	751
		N	394	90	1	485	684	3	11	698

(CONTINUED)

LOUISIANA COLLEGES AND UNIVERSITIES
SOURCE: FALL 1988 STATEWIDE STUDENT PROFILE SYSTEM
1987-88 ACT DATA
BY INSTITUTION AND RESIDENCY/CITIZENSHIP

			SOURCE							
			ACT				SSPS			
			RACE				RACE			
			BLACK	OTHER	WHITE	TOTAL	BLACK	OTHER	WHITE	TOTAL
			N	N	N	N	N	N	N	N
INST	STATUS	CON/N								
SOUTHERN-BR	2. NON-RES U S	N	.	.	.	.	549	5	1	555
	3. FOREIGN	N	.	.	.	.	.	12	.	12
	TOTAL		749	316	4	1069	1965	34	17	2016
SOUTHERN-NO	STATUS	CON/N								
	1. RESIDENT	C	207	30	4	241	304	6	5	315
		N	5	4	1	10	14	.	2	16
	2. NON-RES U S	N	.	.	.	.	34	.	1	35
	3. FOREIGN	N	.	.	.	.	.	4	.	4
	TOTAL		212	34	5	251	352	10	8	370
SOUTHERN-SHREV	STATUS	CON/N								
	1. RESIDENT	C	33	337	1	371	274	1	20	295
		N	.	11	.	11	21	1	39	61
	2. NON-RES U S	N	.	.	.	.	13	.	8	21
	TOTAL		33	348	1	382	308	2	67	377
TULANE	STATUS	CON/N								
	1. RESIDENT	C	24	45	70	139	.	.	.	.
		N	10	21	47	78	.	.	.	.

(CONTINUED)

LOUISIANA COLLEGES AND UNIVERSITIES
SOURCE: FALL 1988 STATEWIDE STUDENT PROFILE SYSTEM
1987-88 ACT DATA
BY INSTITUTION AND RESIDENCY/CITIZENSHIP

			SOURCE							
			ACT				SSPS			
			RACE				RACE			
			BLACK	OTHER	WHITE	TOTAL	BLACK	OTHER	WHITE	TOTAL
			N	N	N	N	N	N	N	N
INST	TOTAL									
TULANE			34	66	117	217	.	.	.	.
XAVIER	STATUS	CON/N								
	1. RESIDENT	C	188	16	2	206	.	.	.	.
		N	37	5	.	42	.	.	.	.
	TOTAL		225	21	2	248	.	.	.	.
CENTENARY COL.	STATUS	CON/N								
	1. RESIDENT	C	4	18	33	55	.	.	.	.
		N	1	9	27	37	.	.	.	.
	TOTAL		5	27	60	92	.	.	.	.
LA COLLEGE	STATUS	CON/N								
	1 RESIDENT	C	4	15	66	85	.	.	.	.
		N	2	13	73	88	.	.	.	.
	TOTAL		6	28	139	173	.	.	.	.
LOYOLA	STATUS	CON/N								
	1. RESIDENT	C	34	98	136	268	.	.	.	.
		N	6	13	30	49	.	.	.	.
	TOTAL		40	111	166	317	.	.	.	.
HOLY CROSS	STATUS	CON/N								
	1. RESIDENT	C	.	3	.	3	.	.	.	.

(CONTINUED)

LOUISIANA COLLEGES AND UNIVERSITIES
SOURCE: FALL 1988 STATEWIDE STUDENT PROFILE SYSTEM
1987-88 ACT DATA
BY INSTITUTION AND RESIDENCY/CITIZENSHIP

			SOURCE							
			ACT				SSPS			
			RACE				RACE			
			BLACK	OTHER	WHITE	TOTAL	BLACK	OTHER	WHITE	TOTAL
			N	N	N	N	N	N	N	N
INST	TOTAL									
HOLY CROSS			.	3	.	3	.	.	.	.
BOSSIER COMM COL	STATUS	CON/N								
	1. RESIDENT	C	8	116	80	204	.	.	.	.
		N	.	1	4	5	.	.	.	.
	TOTAL		8	117	84	209	.	.	.	.
CHARITY HOSPITAL	STATUS	CON/N								
	1. RESIDENT	C	4	.	5	9	.	.	.	.
		N	.	.	1	1	.	.	.	.
	TOTAL		4	.	6	10	.	.	.	.
JIMMY SWAGGART	STATUS	CON/N								
	1. RESIDENT	C	.	60	39	99	.	.	.	.
		N	1	6	2	9	.	.	.	.
	TOTAL		1	66	41	108	.	.	.	.
TOTAL	STATUS	CON/N								
	1. RESIDENT	C	2097	4148	7458	13703	3588	813	11471	15872
		N	1664	1514	4371	7549	2471	488	5687	8646
	2. NON-RES U S	N	.	.	.	.	1530	103	793	2426
	3. FOREIGN	N	.	.	.	.	9	184	8	201

(CONTINUED)

LOUISIANA COLLEGES AND UNIVERSITIES
SOURCE: FALL 1988 STATEWIDE STUDENT PROFILE SYSTEM
1987-88 ACT DATA
BY INSTITUTION AND RESIDENCY/CITIZENSHIP

		SOURCE							
		ACT				SSPS			
		RACE				RACE			
		BLACK	OTHER	WHITE	TOTAL	BLACK	OTHER	WHITE	TOTAL
		N	N	N	N	N	N	N	N
TOTAL	TOTAL	3761	5662	11829	21252	7598	1588	17959	27145

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300

UNITED STATES OF AMERICA,
Plaintiff,

v.

STATE OF LOUISIANA, *et al.*,
Defendants.

[Filed Sept. 27, 1989]

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that the United States of America hereby appeals to the Court of Appeals for the Fifth Circuit from the orders entered by this court on July 19, 1989 and August 4, 1989.

JAMES P. TURNER
Acting Assistant Attorney General

/s/ Jessica Dunsay Silver
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300

Section "A"

UNITED STATES OF AMERICA,
Plaintiff,

v.

STATE OF LOUISIANA, *et al.*,
Defendants.

[Filed Sept. 29, 1989]

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the State of Louisiana, through its Governor, Charles E. "Buddy" Roemer, III, the Board of Regents, the Board of Trustees for State Colleges and Universities, and the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College, (collectively the "defendants") join and hereby appeal to the Supreme Court of the United States from the judgment entered by the three-judge district court on August 2, 1988, which was made final on August 4, 1989. The defendants, with the exception of the Board of Trustees for State Colleges and Universities, also appeal from those portions of the judgments entered by the three-judge district court on July 19, 1989, and August 4, 1989, which ordered the merger of Louisiana State University's Paul M. Hebert Law Center and the Southern University Law Center.

This appeal is taken pursuant to 28 U.S.C. § 1253.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 29, 1989, copies of the foregoing Notice of Appeal to the Supreme Court of the United States were sent by U.S. mail, postage prepaid, to the following:

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/s/ J. J. Levin, Jr.
JOSEPH J. LEVIN, JR.

(3) (5) (4)

Nos. 89-556, 89-557, and 89-771

FILED
DEC 8 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF LOUISIANA, EX REL. WILLIAM J. GUSTE, JR., ATTORNEY GENERAL OF LOUISIANA, APPELLANT

v.

UNITED STATES OF AMERICA

BOARD OF SUPERVISORS OF SOUTHERN UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE, APPELLANT

v.

UNITED STATES OF AMERICA

STATE OF LOUISIANA, EX REL. CHARLES E. "BUDDY" ROEMER, III, ET AL., GOVERNOR OF LOUISIANA, APPELLANTS

v.

UNITED STATES OF AMERICA

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

MOTION TO DISMISS

KENNETH W. STARR
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QUESTION PRESENTED

Whether the action filed by the United States against the State of Louisiana and others required the convening of a three-judge district court under 28 U.S.C. 2281 (1970) (repealed 1976), thereby vesting this Court with appellate jurisdiction under 28 U.S.C. 1253.

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TABLE OF AUTHORITIES

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Norton v. *Mathews*, 427 U.S. 524 (1976)	14
Sands v. *Wainwright*, 491 F.2d 417 (5th Cir. 1973), cert. denied, 416 U.S. 992 (1974)	15
United States v. *Alabama*, 828 F.2d 1532 (11th Cir. 1987), cert. denied, 108 S. Ct. 2857 (1988)	19
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Constitution, statutes, and rule:

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Act of Aug. 12, 1976, Pub. L. No. 94-381, 90 Stat. 1119:
§ 1, 90 Stat. 1119 3
§ 7, 90 Stat. 1120 3
Civil Rights Act of 1964, Tit. VI, 42 U.S.C. 2000d *et seq.* 2
28 U.S.C. 1253 ..... 2, 14, 15, 19
28 U.S.C. 1404(a) 4
28 U.S.C. 2281 (1970) 3, 14, 15, 16, 17, 19
28 U.S.C. 2284 (1982 & Supp. V 1987) 3
Fed. R. Civ. P. 53 10

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-556

STATE OF LOUISIANA, EX REL. WILLIAM J. GUSTE, JR., ATTORNEY GENERAL OF LOUISIANA, APPELLANT

v.

UNITED STATES OF AMERICA

No. 89-557

BOARD OF SUPERVISORS OF SOUTHERN UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE, APPELLANT

v.

UNITED STATES OF AMERICA

No. 89-771

STATE OF LOUISIANA, EX REL. CHARLES E. "BUDDY" ROEMER, III, ET AL., GOVERNOR OF LOUISIANA, APPELLANTS

v.

UNITED STATES OF AMERICA

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

MOTION TO DISMISS

OPINIONS BELOW

The opinion of the district court (J.S. App. 3a-38a) is reported at 692 F. Supp. 642.[1] The opinion of the district

[1] "J.S. App." refers to the joint appendix to the jurisdictional statements in Nos. 89-556 and 89-557, unless otherwise indicated.

court approving the remedial plan (J.S. App. 39a-77a) is reported at 718 F. Supp. 499. The opinion of the district court on motions to alter or amend the judgment (J.S. App. 81a-104a) is reported at 718 F. Supp. 525. The opinion of the district court on motions to stay, together with its supplemental order (J.S. App. 78a-80a, 105a-108a), are reported at 718 F. Supp. 521.

JURISDICTION

The judgment of the district court was entered on August 4, 1989. J.S. App. 78a-80a. The notices of appeal in Nos. 89-556 and 89-557 were each filed on August 10, 1989. J.S. App. 1157a-1160a, 1161a-1163a. The notice of appeal in No. 89-771 was filed on September 29, 1989. 89-771 J.S. App. 210a-212a. The jurisdiction of this Court is invoked under 28 U.S.C. 1253.[2] For the reasons stated, see pp. 14-19, *infra*, this Court lacks jurisdiction over these appeals.

STATEMENT

1. a. In 1974, after the United States Department of Health, Education, and Welfare had notified the State of Louisiana that, in the Department's view, it was operating a racially segregated system of higher public education, the Attorney General of the United States filed this action in the Middle District of Louisiana under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, and the Fourteenth Amendment. The complaint named the State

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[2] Section 1253 provides in pertinent part that

> any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

and the State's several boards of higher education as defendants. As relief, the United States sought an order enjoining the defendants from maintaining the State's segregated system and an order requiring them "to develop, submit and implement detailed plans which promise realistically and promptly to eliminate all vestiges of a dual system of higher education existing within the State of Louisiana." J.S. App. 163a; see *id.* at 9a-10a.

Along with the complaint, the United States filed a formal request that the district court convene a three-judge court under 28 U.S.C. 2281 (1970) (repealed 1976) and 28 U.S.C. 2284.[3] See J.S. App. 184a-196a. That request was granted in March 1974. See *id.* at 197a-198a. After the restructuring of the State's higher education boards in 1976,[4] the parties jointly moved to substitute the following

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[3] 28 U.S.C. 2281 (1970) provided in pertinent part:

> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute * * * shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title

Congress, by the Act of Aug. 12, 1976, Pub. L. No. 94-381, § 1, 90 Stat. 1119, repealed 28 U.S.C. 2281. That repeal does not affect this case because the complaint was filed before the repeal's effective date, August 12, 1976. See Act of Aug. 12, 1976, Pub. L. No. 94-381, § 7, 90 Stat. 1120; see also *Lewis* v. *BT Inv. Managers, Inc.*, 447 U.S. 27, 29 n.1 (1980).

[4] In 1974, Louisiana established the current four-board system for governing the State's public colleges and universities. See La. Const. of 1974, Art. 8, §§ 5-7. The Board of Regents "has general responsibility for planning, coordinating and reviewing the budgets and academic program offerings of each state university." J.S. App. 40a. The remaining three boards, the Board of Supervisors of Southern

defendants: appellant Board of Regents, appellant Board of Supervisors of Southern University and Agricultural and Mechanical College (Southern Board), appellant Board of Trustees for State Colleges and Universities (State College Board), and appellant Board of Supervisors of Louisiana State University and Agricultural and Mechanical College (LSU Board). *Id.* at 10a.[5]

In August 1980, the district court, with the parties' consent, transferred the case to the Eastern District of Louisiana under 28 U.S.C. 1404(a). Trial was scheduled for September 1981. J.S. App. 10a.

University and Agricultural and Mechanical College, the Board of Trustees for State Colleges and Universities, and the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College, each have "direct management authority for a number of" those state schools. *Ibid.*

The Board of Supervisors of Southern University oversees the following Southern University campuses—Southern at Baton Rouge, Southern at New Orleans, and Southern at Shreveport/Bossier City. The Board of Trustees for State Colleges and Universities oversees the following state schools—Louisiana Tech, Grambling State, University of Southwestern Louisiana, Northeast Louisiana, Northwestern State, Southeastern State, McNeese State, Nicholls State, and Delgado Community College. The Louisiana State University Board of Supervisors overseas the LSU system of colleges, including LSU at Baton Rouge, LSU at Shreveport, LSU at Alexandria, LSU at Eunice, and the University of New Orleans. See J.S. App. 40a-41a.

[5] In No. 89-556, the Attorney General of the State of Louisiana has filed a jurisdictional statement on behalf of defendant/appellant State of Louisiana. In No. 89-557, the Southern Board has filed its own jurisdictional statement. And in No. 89-771, the Governor of the State of Louisiana has filed a jurisdictional statement on behalf of the following defendants/appellants: the State, the Board of Regents, the State College Board, and the LSU Board. We will refer to the jurisdictional statement in No. 89-556 as "Att'y Gen. J.S.," the jurisdictional statement in No. 89-557 as "Southern J.S.," and the jurisdictional statement in No. 89-771 as "Gov. J.S."

b. In anticipation of trial, the parties developed a comprehensive record. The record showed that the State had segregated its colleges "[u]p to at least 1954" and continued the schools' racial exclusivity through the mid-1960s. J.S. App. 5a. Although the State had implemented an "open admissions" policy that permitted students of both races to attend all schools, the student enrollment and faculty employment pattern of Louisiana's colleges, as of 1973, remained segregated:[6]

School	% black students	% black faculty
historically white schools		
LSU system	7.7	1.6
Louisiana Tech. Univ.	6.2	0.0
McNeese State	8.4	0.5
Nicholls State Univ.	5.5	2.1
Northeast Louisiana Univ.	9.3	1.7
Northwestern Louisiana Univ.	10.2	1.6
Southeastern Louisiana Univ.	4.2	0.7
Univ. of Southwestern Louisiana	8.3	3.2
historically black schools		
Southern Univ. system	99.3	87.2
Grambling State	99.1	77.7

See J.S. App. 164a-165a.

Depositions were also taken of experts who had considered the effect of the State's dual system on educational concerns such as academic offerings, physical facilities, and apportionment of resources among the various state

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[6] The record also showed that, as of 1981, the membership of appellants LSU Board and State College Board was predominantly white, while that of appellant Southern Board was predominantly black. J.S. App. 44a

schools. Those experts concluded that the State, together with appellant Boards, had created the following inequalities under the dual system they had perpetuated: (1) historically white colleges received more desirable and better conditioned physical facilities than historically black colleges; (2) historically white colleges obtained superior and more diverse academic programs than historically black colleges;[7] and (3) current financial assistance formulas maintained, and did not eliminate, the unequal effect of past funding deficits at historically black colleges.[8]

In other words, segregation in Louisiana's higher education accomplished not only the separation of students by race, but also created inequalities in educational opportunities. Those inequalities, together with the proximate placement of black and white schools with overlapping curricula, continued the racial identifiability of the State's schools, and discouraged white students from attending the traditionally black schools, even after the State abolished formal segregation in the wake of *Brown* v. *Board of Educ.*, 347 U.S. 483 (1954). See, *e.g.*, J.S. App. 44a, 670a, 689a.

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[7] In this regard, one expert noted that the academic offerings at white colleges located near historically black schools were not only better, but also duplicated the course offerings at those black schools. See C. Conrad, Louisiana Curriculum Analysis (Mar. 30, 1981), filed with Deposition of Clifton F. Conrad (Apr. 13, 1981).

[8] See generally C. Conrad, Louisiana Curriculum Analysis (Mar. 30, 1981), filed with Deposition of Clifton F. Conrad (Apr. 13, 1981); H. Kaiser, Facilities Evaluation of Eight Institutions of Higher Education of the State of Louisiana (Mar. 10, 1981), filed with Deposition of Harvey Kaiser (Apr. 7, 1981) and Affidavit of Harvey Kaiser (May 6, 1988); L. Leslie, The Financial Conditions of Historically Black and Comparable Louisiana Institutions of Higher Education (Mar. 23, 1981), filed with Affidavit of Larry L. Leslie (May 9, 1988).

2. a. After extensive briefing and lengthy pretrial conferences, the United States and appellants entered into a consent decree. The district court approved the decree in September 1981, concluding that it "embodies a reasonable and specific system-wide desegregation plan which promises realistically to work." J.S. App. 266a. Under the consent decree, see *id.* at 199a-255a, the State agreed to take the following remedial measures: (1) increase other-race membership on the four governing boards, appellants Board of Regents, Southern Board, State College Board, and LSU Board; (2) recruit other-race students to historically white and black schools through open admissions, increased information and recruitment campaigns, and additional student financial assistance; (3) increase faculty integration and provide educational opportunities to blacks in order to increase the number of black faculty members; and (4) increase faculty and student exchange programs and cooperative degree programs between historically white and black schools located near each other. See *id.* at 199a-220a.[9] The consent decree also committed the State to placing new academic programs at the historically black schools, *id.* at 222a-228a, as well as making significant capital improvements and increasing financial support for those schools, *id.* at 228a-231a.[10]

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[9] For example, Grambling and Louisiana Tech are located in Lincoln Parish. LSU's Baton Rouge campus is near Southern's Baton Rouge campus, as are LSU's and Southern's respective schools in New Orleans.

[10] Parts IV and V of the decree specifically provided that the decree (and the court's jurisdiction over the action) would expire on December 31, 1987, unless a party filed a motion before that date "either to seek compliance with [the decree] or to seek other relief necessarily implicating [the decree] * * *." J.S. App. 235a; see *id.* at 11a.

b. As of late 1987, six years after the decree had been entered, the student enrollment figures for the state colleges had scarcely changed. Grambling remained 98.5% black, and Southern's Baton Rouge campus remained 86% black. With two exceptions,[11] all the former historically white schools remained over 80% white. See J.S. App. 7a; see also p. 5, *supra*. The three governing boards, appellants Southern Board, LSU Board, and State College Board, also remained racially identifiable. See J.S. App. 661a; note 6, *supra*. The State had spent only $34 million of the $125 million earmarked for capital improvements, and had failed fully to fund other financial and academic aspects of the decree. See J.S. App. 364a. In these circumstances, the United States was of the view that the State and appellant Boards had not fully eliminated the vestiges of segregation. And in light of the continuing inequalities between the historically white and black schools and the proximate placement of such schools with overlapping curricula, the United States considered that students in Louisiana did not have a truly "unfettered choice" of where to attend school. See *Bazemore* v. *Friday*, 478 U.S. 385, 407 (1986).

c. In late December 1987, the United States therefore exercised its right under the consent decree and filed a motion with the district court that requested "a hearing * * * for the purpose of determining whether [appellants] have fully implemented all provisions of [the decree] and are operating the [Louisiana state] system of public higher education on a unitary basis." J.S. App. 267a. Appellant Southern Board, although aligned as a defendant in the action, joined the United States' motion, contending,

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[11] Northwestern State's student body had become 66% white; the University of New Orleans' student body had become 75% white. See J.S. App. 7a; see also p. 5, *supra*.

among other things, that the State had not fulfilled "its commitment [under the decree] to enhance predominantly black institutions," had not satisfied "the equal opportunity provisions of the decree," and had not "otherwise implemented [the decree] in good faith." *Id.* at 563a.

In lieu of an evidentiary hearing, the parties submitted "hundreds of pages of briefs and exhibits," and filed cross-motions for summary judgment on the issue of liability. J.S. App. 4a.

3. In August 1988, the district court held that appellants were continuing to operate "an unlawful, dual system of public higher education in violation of Title VI." J.S. App. 4a. The court found that the State, through the supervision of appellant Board of Regents and each of the other appellants, operates 20 institutions. Four institutions "that were originally established as 'black schools' [including Southern] * * * remain predominantly black"; the eleven institutions "that were originally established as 'white schools' * * * remain predominantly, and disproportionately, white." *Id.* at 5a, 6a. The court noted that the other four schools "are all predominantly, and disproportionately, white." *Id.* at 6a. The court also found that "[t]he four board[s] governing these twenty schools suffer from similar racial identifiability. The Southern Board remains over three-fourths black, while the other three boards are between 70% and 80% white." *Id.* at 9a. Thus, the court fully accepted appellant Board of Regents' concession that "the racial identifiability of Louisiana's public colleges and universities persists today is . . . undisputed." *Ibid.*

Turning to the merits of the controversy, the district court determined that "[i]n failing to achieve a truly unitary system at the higher level of public education, the State continues to provide polarization and separation on

a racial basis." J.S. App. 33a.[12] The court acknowledged the State's interest in fostering "freedom of choice," but concluded that

> [a]lthough the State has the authority, and should be encouraged, to promote different and unique types of higher learning institutions, the State fails when it fosters two universities or colleges in close geographic proximity offering overlapping courses and programs—especially where one is predominantly black and one is predominantly white.

Id. at 34a.

4. In December 1988, the district court appointed a special master, under Fed. R. Civ. P. 53, and charged him with the responsibility "to review the proposed [remedial] plans submitted by the parties and to conduct hearings regarding the viability of the proposed plans, and any other appropriate remedial measures." J.S. App. 626a-627a; see also *id.* at 577a-578a, 579a-581a.

In May 1989, after holding hearings and receiving submissions from the parties, the special master issued his final report. See J.S. App. 623a-715a. That report recommended detailed and comprehensive measures to overhaul the State's higher education system, including: (1) abolishing the State's current four-board structure and replacing it with a single governing board responsible for implementing and overseeing specific changes in the school system (*id.* at 652a-665a); (2) creating "campus-based advisory committees [to] help * * * maintain channels of communication between institution and board"

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[12] The court also stated that the consent decree's increased funding could not desegregate the system because that funding would neither eliminate the duplication of course offerings between proximate white and black schools, nor attract white students to the historically black schools. J.S. App. 34a-35a.

(*id.* at 665a); (3) classifying institutions ("tiering") and implementing selective admissions standards—as opposed to the then statewide policy of open admissions (*id.* at 667a-680a);[13] (4) implementing a "community college system" (*id.* at 680a-688a); (5) reducing instances of "program duplication" among schools (*id.* at 689a-691a); (6) and taking steps to desegregate LSU Law Center (short of merger with the predominantly black Southern Law Center), such as offering substantial scholarships to black students, undertaking "vigorous recruitment efforts," and setting a "10 percent category of admissions exceptions [for minority applicants]" (*id.* at 692a, 693a).

5. In July 1989, after receiving comments and objections from the parties, the district court issued an order generally accepting the special master's report and recommendations. See J.S. App. 39a-77a. With respect to the State's current four-board structure, the district court observed that "[g]iven the racially identifiable membership of the Board, none, including the Southern board which vigorously seeks to preserve its separate identity, is an exponent of racial integration." *Id.* at 44a. It then found that "[t]he present scheme for governing education in Louisiana—three operating boards and one coordinating board—has perpetuated illegal segregation in Louisiana's higher education, even though the system's creation postdates the filing of this case." *Id.* at 45a. The court therefore concluded that "[t]he system of multiple boards is * * * a defect in the state's system of higher education that violates the federal constitution." *Ibid.* Accordingly,

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[13] The report recommended establishing three separate "tiers" of schools—a flagship school (LSU), doctoral institutions (including Southern University), and comprehensive institutions (including Grambling)—with the new governing board to adopt more select admissions criteria appropriate to each "tier." See J.S. App. 667a-680a.

the court ordered that "the four boards currently governing public higher education in Louisiana shall be disbanded [within 30 days] and their powers consolidated into a single state governing board." *Id.* at 63a.[14]

Turning to problem of the effects of racial segregation on legal education in Louisiana, the district court found that "as long as the two institutions of disparate quality exist"—Southern Law Center and LSU Law Center—"the State will continue to produce a secondary class of lawyers unable to compete fully in the professional context." J.S. App. 61a. The court further found that "[g]iven the racial composition of the two schools, the negative impact of this disparity will fall largely upon the black law student population, and given the consent decree experience, a simple provision of funds will not resolve this problem, even assuming such funding is a realistic possibility."

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[14] The new board would consist of 17 voting members (and one non-voting student member); the voting members would be appointed by the Governor and confirmed by the Louisiana Senate. J.S. App. 64a-65a. In addition, the board would have "the special mission of monitoring and implementing [the court's remedial order] and of insuring that progress toward eliminating Louisiana's racially dual education system is achieved." *Id.* at 63a.

The district court, agreeing with other recommendations filed by the special master, specifically charged the new board with a variety of tasks within certain deadlines, including: developing and implementing procedures for the use of advisory committees at each school (J.S. App. 66a); implementing a scheme for classifying each school with regard to programs and admissions standards (*id.* at 66a-68a); developing selective admission requirements to replace the "traditional system of open admissions to all state universities" (*id.* at 68a); drafting a comprehensive plan for a community college system (*id.* at 70a-71a); and implementing "a system of enrollment management, program review and program transfer to address the problem of program duplication and accompanying waste of resources and segregation" (*id.* at 71a).

Ibid.[15] Accordingly, the district court did not accept the special master's recommendation to defer a merger of the two schools. Instead, the court directed the newly created board, over the next five years, to "develop a plan for merger of the two schools * * * [that] will minimize the necessary adjustment by the students, administration, and faculty and the impact of curriculum change." *Ibid.*[16]

6. On August 4, 1989, after modifiying its remedial order in certain respects, see J.S. App. 81a-99a, the district court denied motions to stay its order, see *id.* at 78a-80a.[17] On August 18, this Court stayed the district court's order pending the timely docketing and disposition of appeals then filed by the Southern Board (No. 89-557)

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[15] As the court observed, "Southern Law Center is desegregated, with a student body of 58 percent black and 42 percent white and a faculty (including part-time) which is virtually 50/50." J.S. App. 60a. LSU Law Center, on the other hand, "had a minuscule percentage of black students. During the period of the consent decree, it ranged from 1.9 percent to 0.8 percent. In 1988, it was only three percent." *Ibid.*

[16] The court also ordered the board, by the 1990-1991 school year, to "begin implementing the merger of Southern Law Center into the LSU Law Center," and specifically directed the LSU Law Center to "undertake as soon as practicable, but no later than the 1990-1991 school year, vigorous efforts for recruiting blacks, including ten percent admissions exceptions for black students, offering scholarships to prospective black students and appointing a special admissions officer for black students * * *." J.S. App. 72a, 73a.

[17] At this point in the litigation, the State began to speak with two voices. Although the State's Attorney General sought a stay of the district court's orders, the Governor of Louisiana also filed a brief with the district court. The Governor, on behalf of the State of Louisiana, opposed the motion to stay. See J.S. App. 81a n.2. The dispute over the State's legal representation continues before this Court. See note 5, *supra*.

and the Attorney General on behalf of the State (No. 89-556). *Id.* at 2a.[18]

ARGUMENT

These separately docketed appeals bring before this Court the federal government's longstanding challenge to the State of Louisiana's failure to eliminate the lasting effects of its racially segregated system of higher public education. In our view, however, the action filed by the United States in 1974 did not require the convening of a three-judge district court under 28 U.S.C. 2281 (1970) (repealed 1976). As a result, the Court at this time lacks appellate jurisdiction under 28 U.S.C. 1253 and the appeals must be dismissed. *E.g., Weinberger* v. *Salfi*, 422 U.S. 749, 763 n.8 (1975).[19]

1. Appellants each invoke this Court's jurisdiction under 28 U.S.C. 1253. *E.g.*, Att'y Gen. J.S. 2-4; Southern J.S. 2; Gov. J.S. 2-4, 8-16; see note 2, *supra*. The Court has appellate jurisdiction over this appeal under Section 1253 only if the action filed by the United States required the convening of a three-judge court under 28 U.S.C. 2281 (see note 3, *supra*). *E.g., Weinberger* v. *Salfi*, 422 U.S. at 763 n.8; see *Norton* v. *Mathews*, 427 U.S. 524, 531 (1976). In its complaint, the United States alleged that, "[a]cting pursuant to Louisiana law and usage," appellants "have established and perpetuated dualism based upon race in the operation of state institutions of higher education by

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[18] On September 29, 1989, the Governor of Louisiana, also on behalf of the State, filed a separate notice of appeal in No. 89-771. See J.S. App. 210a-212a.

[19] Because resolution of the jurisdictional issue will determine the forum in which litigation of this case will proceed, and in light of the importance of an expeditious decision on the merits of the underlying controversy, we urge the Court not to postpone ruling on that issue.

constructing and maintaining institutions of higher learning designed to serve students of a particular race." J.S. App. 159a. The complaint further alleged that the institutions maintained explicitly racial admissions policies before 1953. *Id.* at 160a-161a. Thereafter, the complaint charged, "[t]he acts and practices of [appellants] * * * maintain[ed] and perpetuate[d] an unlawful dual system of higher education based upon race," *id.* at 162a, and appellants "failed in their affirmative duty * * * to eliminate the vestiges of the dual system," *ibid.*

As relief, the complaint sought an order enjoining appellants from maintaining their segregated system and an order requiring them "to develop, submit and implement detailed plans which promise realistically and promptly to eliminate all vestiges of a dual system of higher education existing within the State of Louisiana." J.S. App. 163a. Since the complaint raised a substantial constitutional challenge to the State's practice and policy and sought widespread injunctive relief, the United States requested (and received) a three-judge court under Section 2281, as then construed by the Fifth Circuit in *Sands* v. *Wainwright*, 491 F.2d 417, 421-423 (1973) (en banc), cert. denied, 416 U.S. 992 (1974). See J.S. App. 185a-196a. This Court's intervening decisions in *Morales* v. *Turman*, 430 U.S. 322 (1977), and *Costello* v. *Wainwright*, 430 U.S. 325 (1977), however, rejected the *Sands* court's construction of Section 2281, and thus establish that the action filed by the United States did not require the convening of a three-judge court. Accordingly, the Court at this time lacks jurisdiction over these appeals under 28 U.S.C. 1253.[20]

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[20] None of the parties, including the United States, ever requested the district court to reconsider the propriety of convening a three-judge panel, although alerted to that issue by Chief Judge Brown's

In *Morales* v. *Turman, supra*, plaintiffs raised constitutional challenges to a state agency's practices concerning the custodial supervision of juveniles. In ordering the convening of a three-judge court under Section 2281, the Fifth Circuit concluded that Congress had not drawn a distinction between challenges to state "regulations" as opposed to challenges to state "practices." *Morales* v. *Turman*, 535 F.2d 864, 872 (1976). This Court, however, rejected that conclusion, expressly holding that a challenge to statewide practices did not call for the convening of a three-judge court under Section 2281:

> In construing § 2281, this Court has concluded that the three-judge court procedure is brought into play in any "suit which seeks to interpose the Constitution against enforcement of a state policy, whether such policy is defined in a state constitution or in an ordinary statute or through the delegated legislation of an 'administrative board or commission.' " *Phillips* v. *United States*, 312 U.S. 246, 251 (1941). We have never, however, considered the generalized, unwritten practices of administration to be equivalent to the "delegated legislation" of an administrative board.

430 U.S. at 323. And in *Costello* v. *Wainwright, supra*, this Court made clear that "the applicability of § 2281 as written turns on whether a state statute is alleged to be unconstitutional, not on whether an equitable remedy for unconstitutional state administrative behavior ultimately impinges on duties imposed under concededly constitutional state statutes." 430 U.S. at 326.

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initial order. See J.S. App. 197a-198a. Nor did the district court address the issue, other than in a brief statement in its 1988 liability opinion. See *id.* at 10a ("Plaintiff having properly requested a three-judge court pursuant to 28 U.S.C. §§ 2281 and 2284, a three-judge court was convened.").

By its terms, the complaint here alleged that appellants had maintained segregated public colleges, in violation of Title VI and the Fourteenth Amendment, and sought an injunction against various acts, practices, and derelictions in duty on the part of appellants that had perpetuated the racially segregated school system. See J.S. App. 153a-165a. But as this Court made plain in *Morales* v. *Turman*, 430 U.S. at 323-324, a constitutional challenge to a state actor's practice is not equivalent to the type of action seeking to enjoin implementation (or enforcement) of an allegedly unconstitutional state statute that calls for a three-judge court under Section 2281. Unless the former lawsuit specifically seeks to enjoin operation of state law, the Court explained, it does not meet the threshold requirements of jurisdiction under Section 2281. See *Morales*, 430 U.S. at 322-323.

To be sure, the district court did enjoin the continued existence of the State's four-board structure—a system created by Louisiana state law—on the ground that this structure had facilitated the perpetuation of illegal separation. See J.S. App. 63a; see pp. 11-12, *supra*. However, no party to this action ever alleged that the statutory scheme creating the governing boards was unconstitutional and the district court itself did not suggest that the state laws creating that structure were enacted (or maintained) for racially discriminatory purposes.[21] Accordingly, since the

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[21] Although the complaint set forth the Louisiana state statutes that had originally required explicit racial segregation on each of the State's college campuses (see J.S. App. 159a-162a), the complaint, by its terms, did not seek to enjoin those laws. Indeed, the State conceded that it had long abandoned implementation of those statutes. See *id.* at 4a-5a. In any event, a constitutional challenge to those laws would not have supported the convening of a three-judge court under Section 2281. Patently unconstitutional statutes do not present substantial constitutional issues requiring a three-judge panel. See, *e.g.*, *Goosby*

complaint here, like those in *Morales* and *Costello*, challenged state officials' illegal practices taken within their authority under state law, and since the only state laws affected by the district court's remedial orders were not specifically challenged in this action, the convening of a three-judge court was unwarranted.

2. The State seeks to avoid *Morales*' holding by claiming that "[t]his case, unlike *Morales*, does not involve challenged, unwritten practices of administration. • • • Here state officials have acted under written authority, both statutory and constitutional." Gov. J.S. 15 (internal quotation marks and citation omitted). But no party in *Morales* contended that state officials were operating the state facility without statutory authorization; rather, plaintiffs there, as here, alleged that state officials were exercising their authority in an unconstitutional manner. See *Morales*, 430 U.S. at 322-323.[22]

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v. *Osser*, 409 U.S. 512, 518 (1973); *Bailey* v. *Patterson*, 369 U.S. 31, 33-34 (1962).

[22] An attempt to distinguish *Costello* is similarly ill-fated. As we have stated, see pp. 14-15, *supra*, and contrary to the State's assertion, the complaint here plainly did not "alleg[e] that the implementation of Louisiana statutes and sections of the Louisiana Constitution violated Title VI and the Fourteenth Amendment." Gov. J.S. 16.

The State also claims (Gov. J.S. 13-14) that the district court's remedial orders' possible effect on officials' actions mandated by state statute required the convening of a three-judge court. That claim is meritless. In *Costello*, this Court expressly held that "[t]he applicability of § 2281 • • • [does not] turn[] • • • on whether an equitable remedy for unconstitutional state administrative behavior ultimately impinges on duties imposed under concededly constitutional state statutes." 430 U.S. at 326. Indeed, the State would have the Court now ignore the very pitfalls of that approach identified in *Costello*. As the Court there explained, "[t]o hold otherwise would require the postponing of the threshold question of jurisdiction until the merits of the controversy had been fully resolved and the broad outlines of

In any event, the State's submission, if accepted, would vitiate the holdings in both *Morales* and *Costello*, and would have rendered the convening of a three-judge court under Section 2281 a routine, rather than an extraordinary, event. State officials can only take state action when they act under color of some state law. Congress assuredly did not intend such a commonplace factor, capable of being alleged in every action brought against state officials, to satisfy the requirements for convening a three-judge court under Section 2281. In sum, under the circumstances presented, this Court lacks jurisdiction over each of the appeals under 28 U.S.C. 1253 and should dismiss those appeals for want of jurisdiction.

In recognition of the jurisdictional obstacle, the State, in filings by both the Governor and the Attorney General, has filed separate notices of appeal to the Fifth Circuit. Southern has filed its own notice of appeal to that court, as has the United States. See 89-771 J.S. App. 209a.[21] Sound judicial administrative practices further confirm that appellate review over this case should proceed first in the court of appeals. Courts of appeals have considered and decided cases raising similar issues in the context of challenges to state higher education systems. See *United States* v. *Alabama*, 828 F.2d 1532 (11th Cir. 1987), cert. denied, 108 S. Ct. 2857 (1988); *Geier* v. *University of Tennessee*, 597 F.2d 1056 (6th Cir.), cert. denied, 444 U.S. 886 (1979). Indeed, the Fifth Circuit is currently reviewing the federal government's appeal from a district court's judgment that the State of Mississippi had complied with its affirmative duty under Title VI to dismantle a segregated

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equitable relief discerned. Section 2281 embodies no such wasteful and uncertain mandate." *Ibid.*

[21] We will challenge the district court's order requiring the merger of the Southern and LSU Law Centers.

higher education system. See *Ayers* v. *Allain*, 674 F. Supp. 1523 (N.D. Miss. 1987), appeal pending, No. 88-4103 (5th Cir.) (argued May 1, 1989).

CONCLUSION

The appeals should be dismissed for lack of jurisdiction under 28 U.S.C. 1253.

Respectfully submitted.

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Nos. 89-556, 89-557 and 89-771

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF LOUISIANA, *ex rel.* WILLIAM J. GUSTE, JR., ATTORNEY GENERAL OF THE STATE OF LOUISIANA,
Appellant,

STATE OF LOUISIANA, *ex rel.* CHARLES E. "BUDDY" ROEMER, GOVERNOR OF THE STATE OF LOUISIANA, *et al.*,
Appellants,

BOARD OF SUPERVISORS OF SOUTHERN UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the Eastern District of Louisiana

MOTION FOR LEAVE TO FILE AND BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AS *AMICUS CURIAE* URGING DISMISSAL OF THE APPEAL

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In the
Supreme Court of the United States
October Term, 1989

Nos. 89-556, 89-557 and 89-771

State of Louisiana, ex rel. William J. Guste, Jr., Attorney General of the State of Louisiana;

State of Louisiana, ex rel. Charles E. "Buddy" Roemer, Governor of the State of Louisiana, et al.;

Board of Supervisors of Southern University and Agricultural and Mechanical College,

Appellants,

v.

United States of America,

Appellee.

On Appeal from the
United States District Court
for the Eastern District of Louisiana

MOTION OF THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE URGING DISMISSAL OF THE APPEAL

The NAACP Legal Defense & Educational Fund, Inc., (LDF) respectfully moves the Court for leave to file the attached brief as amicus curiae supporting the position of the United States on the jurisdictional issue addressed herein.

The following parties have consented to the filing of this brief: the United States, the State of Louisiana (by the Governor), the Supervisors of Southern University A&M College, Board of Regents of the State of Louisiana, the Louisiana Board of Trustees for State Colleges and Universities, the Board of Supervisors of Louisiana State University and A&M College, and the Bossier Parish School Board. As of the time of filing this brief the Attorney General for the State of Louisiana has not granted consent.

LDF is a non-profit corporation organized under the laws of the State of New York. It was formed to assist

black citizens in securing their rights under the Constitution.[1]

This lawsuit raises important issues regarding the dismantling of formerly dual systems of higher education. LDF historically was involved in the major cases on this question that have been decided by this Court, and based on its experience believes that the law in this area should be developed upon full consideration by the Court with the benefit of intermediate appellate review in the Courts of Appeals.

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[1]Further description of the interest of amicus LDF appears at pages 2-5 of the attached brief, including a description of LDF's history of involvement in school desegregation litigation.

We respectfully submit that LDF's participation will be of assistance to the Court.

Respectfully submitted,

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Question Presented

Whether the Court lacks jurisdiction to entertain this direct appeal under 28 U.S.C. § 1253 where the case was not required to be heard by a panel of three judges because no state statute, law, or regulation was challenged, sought to be enjoined, or actually was enjoined on grounds of its repugnance to the Constitution.

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BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AS AMICUS CURIAE URGING DISMISSAL OF THE APPEAL

Interest Of The NAACP Legal Defense Fund As Amicus Curiae[1]

The NAACP Legal Defense and Educational Fund, Inc. (LDF) is a non-profit corporation established to assist black citizens in securing their constitutional and civil rights. LDF historically has had and continues to have a major role in litigation efforts challenging discrimination and segregation in education.[2]

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[1]The Legal Defense Fund supports the position of the United States on the jurisdictional issue addressed herein.

[2]See, e.g., Brown v. Board of Education, 347 U.S. 483 (1954). LDF represents plaintiffs in the litigation that resulted in the initiation of desegregation efforts in public higher education systems in 18 states, including the State of Louisiana. Adams v. Richardson, 356 F. Supp. 92 (D.D.C. 1973), modified and aff'd unanimously en banc, 480 F.2d 1159 (D.C. Cir. 1973). Other LDF higher education desegregation cases have included: Sweatt v. Painter, 339 U.S. 629 (1950); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950); Adams v. Lucy, 228 F.2d 619 (5th Cir.), cert. denied, 351 U.S. 931 (1956); Meredith v. Fair, 305 F.2d 343 (5th Cir.), cert. denied, 371 U.S. 828 (1962); Alabama State Teachers Association v. Alabama Public School and College Authority, 289 F. Supp. 784 (M.D. Ala. 1968), aff'd per curiam, 393 U.S. 400 (1969); Norris v. State Council of Higher Education for Virginia, 327 F. Supp. 1368 (E.D. Va.), aff'd mem., 404 U.S. 907 (1971); Geier v. Alexander, 593 F. Supp. 1263 (M.D. Tenn. 1984), aff'd, 801 F.2d 799 (6th Cir. 1986).

Based upon this institutional commitment to the elimination of discrimination in education, LDF agrees with the district court below that a state has not fulfilled its affirmative obligation to dismantle its de jure racially dual higher education system where substantial vestiges of the de jure system persist, as the record demonstrates is the case in Louisiana with respect to, inter alia, student enrollment, employment of faculty and staff, distribution and development of academic programs, financing, and school facilities.[3] In light of this showing of a continuing violation, LDF strongly supports the adoption of a remedial plan adequate to assure that those victimized by continuing racial discrimination and its effects are made whole. Such a plan must formulate remedies that promise to increase educational opportunities for the

[3]J.A. 291a-326a [United States' List of Material Facts to the Motion for Summary Judgment, filed May 13, 1988].

members of the class subjected to discrimination -- not limit them -- and courts supervising the remedial process must eschew ineffective or illusory remedies as well as devices that may harm and disadvantage black students in their attempts to surmount the dismal legacy of racially discriminatory education.

By virtue of its active participation in higher education desegregation suits, LDF has a significant interest in the instant appeal, and in particular LDF has a legitimate concern that the law in this area be developed upon a record that is subject to comprehensive review.[4]

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[4]This Court has emphasized that intermediate appellate review facilitates its consideration of important questions by helping to narrow and refine issues and by allowing full development and exploration of the legal theories underpinning a decision. See, e.g., Gonzalez v. Automatic Employees Credit Union, 419 U.S. 90, 99 (1974) ("mediating wisdom of a court of appeals"); Florida Lime & Avocado Growers v. Jacobsen, 362 U.S. 73, 92-93 (1960) ("dominant principle of having this Court review decisions only after they have gone through two judicial sieves") (Frankfurter, J., dissenting).

Here, direct review from the district court's approval of the Special Master's report is not only contrary to law,[5] but also would be imprudent and likely to impair this Court's ability fully to consider and resolve the weighty issues framed in the Jurisdictional Statements. This case should first proceed in the Court of Appeals for the Fifth Circuit[6] and, in order to aid this Court's eventual jurisdiction over this matter, the stay issued by the Court should remain in effect during the pendency of appellate proceedings.

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[5]As argued infra at 14-28, the three-judge court was not "required" to hear this case and therefore the Court lacks jurisdiction to entertain this appeal.

[6]The appellants in this Court have all filed protective notices of appeal to the United States Court of Appeals for the Fifth Circuit.

Statement of Relevant Facts

1. Consideration Below Of The Jurisdictional Issue

To date no court has given full consideration to the propriety of empaneling a three-judge court in this case. When the case was filed in 1974, the United States requested that a three-judge court be convened pursuant to 28 U.S.C. §§ 2281 and 2284 (J.A. 184a). Without deciding the issue, the Chief Judge of the United States Court of Appeals for the Fifth Circuit designated the members of the special tribunal and directed that the three-judge court itself determine if the case was properly before it (J.A. 197a-98a). A three-judge district court was empaneled on April 16, 1974[7] but apparently failed to consider or resolve the question put to it by the Fifth Circuit.

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[7]United States v. Louisiana, 543 F.2d 1125, 1126 (5th Cir. 1976).

Despite the fact that the three-judge court was reconvened on three occasions after repeal of 28 U.S.C. § 2281 in 1976,[8] the propriety of the three-judge court was not disputed, or even seriously addressed, by the parties or the court prior to the instant appeal.[9]

However, in 1976 the Fifth Circuit exercised jurisdiction over an interlocutory appeal from a ruling of the three-judge district court in this case denying a petition for intervention. In so doing, the Fifth Circuit overruled its prior decision in Weiser v. White, 505 F.2d 912 (5th Cir. 1975), requiring such appeals to proceed directly to this Court. The decision was based upon this Court's narrowing of the scope of review of three-judge

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[8]See Act of August 12, 1976, Pub. L. No. 94-381, 90 Stat. 1119, § 7 (1976).

[9]The issue was addressed in passing in 1988: one sentence appears in the district court opinion, without analysis or citation, stating simply that the request for a three-judge court had been properly made in this case (J.A. 10a).

court cases under 28 U.S.C. § 1253, and in particular upon MTM v. Baxley, 420 U.S. 799 (1975), where the Court ruled that a direct appeal would lie only where the order of the three-judge court rested on constitutional grounds. Thus, the Fifth Circuit previously exercised jurisdiction over an appeal from a non-constitutionally based decision in this case in 1976 -- and it did so again in 1981.[10]

2. Allegations Of The Complaint Affecting Jurisdiction

Neither the original Complaint filed in this case in 1974 nor the Amended Complaint filed in 1980 challenge any state law, statute, or regulation as unconstitutional (J.A. 153a-65a, 166a-81a). Instead, both allege that "acts and practices" of state officials maintain and perpetuate

[10]United States v. Louisiana, 543 F.2d 1125 (5th Cir. 1976); United States v. Louisiana, 669 F.2d 314 (5th Cir. 1982)(denial of a petition for intervention).

the dual system previously mandated by state law (J.A. 162a, 176a). Similarly, no request was made to enjoin any state statute or law on grounds that it violated the Constitution (J.A. 162a-63a, 177a).

The gravamen of the Complaint is a challenge to state practices by multiple state officers acting under the authority of state laws themselves left unchallenged. Indeed, in its Memorandum in Support of The Request for A Three-Judge Court, the United States expressly acknowledged that its "Complaint . . . seeks relief . . . which will enjoin the practices of the State of Louisiana as applied and interpreted by the defendants and their agents" (J.A. 193a-94a)(emphasis added). The "Complaint alleges that the defendants and their agents have failed in their affirmative duty to provide specific measures and timetables to eliminate [the racial] dualism" (J.A. 195a).

3. Basis For The Relief Ordered Below

When, in 1981, the parties agreed on a settlement and the court below approved it, no state statute, law, or regulation was stricken or limited in enforcement (J.A. 199a-255a, 256a-66a).

Although in 1989 the State itself advocated a remedial plan, which the court below approved, that substantially restructured Louisiana's higher education system,[11] neither the State nor any other party contended that the supersession of numerous existing provisions of Louisiana law necessary to accomplish that goal should be directed because any of such provisions were repugnant to the federal Constitution.[12]

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[11]See Appendix to Jurisdictional Statement of Governor Roemer, at 25a-31a.

[12]The Southern University Supervisors objected to the plan (J.A. 721a-29a), and the United States "remain[ed] skeptical that the record in this case [could] support the finding that a single board is warranted or that it will enhance desegregation" (J.A. 603a; accord (continued...)

The remedial order entered below is grounded solely upon a federal statute -- Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d et seq. The district court expressly declined to reach the issue whether the United States had standing to sue under the Fourteenth Amendment, concluding that "whatever relief is available to a private plaintiff in a school desegregation suit under the Fourteenth Amendment is available to the United States under Title VI" (J.A. 17a, 84a).[13]

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[12](...continued)
J.A. 1077a). The State never argued that existing Louisiana law violated the federal Constitution.

[13]While there is language in the district court's opinions that invokes the Constitution as the basis for striking the multiple board system (e.g., J.A. 45a), it is clear from the collective opinions of the court, and emphasized in its Reasons for Ruling (August 4, 1989) (J.A. 84a), that the judgment below rested on statutory grounds. Because it concluded that the substantive standard under Title VI was the same as that under the Fourteenth Amendment (J.A. 17a, 22a, 24a), the court in its opinions referred to the Constitution and Title VI interchangeably.

SUMMARY OF THE ARGUMENT

The appeal from the district court's decision must proceed initially in the Court of Appeals for the Fifth Circuit, not this Court. Because the case was not one "required by any Act of Congress to be heard and determined by a district court of three judges," the three-judge court was improperly empaneled and therefore the requirements for direct appeal under 28 U.S.C. § 1253 are not satisfied.

A three-judge court may be convened properly under Section 2281 only if the complaint raises a federal constitutional challenge to an identified state law or regulation and requests that enforcement of the state law or regulation be enjoined on the ground of its repugnance to the federal Constitution. Morales v. Turman, 430 U.S. 322 (1977) (per curiam); Costello v. Wainwright, 430 U.S. 325 (1977) (per curiam); Baxter v. Palmigiano, 425 U.S.

308 (1976); Butler v. Dexter, 425 U.S. 262 (1976) (per curiam). No such challenge was raised here (J.A. 153a-83a.); thus, a three-judge court should never have been empaneled and most assuredly should not have been reconvened once it became clear that it had been improperly empaneled at the outset.

Moreover, the correct procedure in cases raising both constitutional and non-constitutional claims is to have a single judge make an initial determination of the statutory issues -- which may obviate the need to convene a three-judge court. Hagans v. Lavine, 415 U.S. 528, 543-44 (1974); Rosado v. Wyman, 397 U.S. 397, 403 (1970). Had this procedure been followed in the instant case, there would have been no need to convene a three-judge district court.

This conclusion is bolstered by the fact that the three-judge court here was convened and reconvened

ultimately to render a decision resting only on statutory grounds, Title VI (J.A. 17a). The Court has held that a three-judge court is not required in these circumstances. MTM, Inc. v. Baxley, 420 U.S. 799 (1975); Gonzalez v. Automatic Employees Credit Union, 419 U.S. 90 (1974).

This appeal should proceed in the Court of Appeals for the Fifth Circuit and the stay issued by this Court should, pursuant to the All Writs Act, 28 U.S.C. § 1651, remain in effect during the pendency of appellate proceedings.

ARGUMENT

A. The Court Lacks Jurisdiction To Entertain This Direct Appeal Because The Case Was Not Required To Be Heard By A Three-Judge Court As No State Law Was Challenged Or Enjoined on Constitutional Grounds.

The Jurisdictional Statements rely on 28 U.S.C. § 1253 as the basis for this Court's jurisdiction of these

appeals. That section allows direct appeals to this Court from an order granting or denying an interlocutory or permanent injunction in any civil action "required by any Act of Congress to be heard and determined by a district court of three judges." (Emphasis added.) This Court's appellate jurisdiction under Section 1253 turns on whether the three-judge court was correctly convened.[14]

1. Appellants apparently contend that 28 U.S.C. § 2281 required this case to be heard by three judges.[15]

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[14]Gonzalez v. Automatic Employees Credit Union, 419 U.S. at 95 n.12.

[15]Section 2281 was repealed by Congress in 1976 but remains applicable to actions commenced before the date of repeal. Act of August 12, 1976, Pub. L. No. 94-381, 90 Stat. 1119, § 7 (1976). It provided that

> an interlocutory or permanent injunction restraining the enforcement . . . of any State statute . . . shall not be granted by any district court or judge thereof upon the ground of unconstitutionality of such statute unless the application therefore is heard and determined by a district court of three judges.

The statute is to be strictly construed. Allen v. State Board of (continued...)

However, this Court has unanimously held that Section 2281 required a three-judge court only where the initial pleadings framed a challenge to a specific state law provision on constitutional grounds[16] and requested an injunction against enforcement of an identified state law or regulation on constitutional grounds.

In Costello v. Wainwright, 430 U.S. 325 (1977) (per curiam), the Court held:

> The applicability of § 2281 as written turns on whether a state statute is challenged to be unconstitutional, not on whether an equitable remedy for unconstitutional state administrative behavior ultimately impinges on duties imposed under concededly constitutional state statutes.

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[15](...continued)
Elections, 393 U.S. 544, 561 (1969); Phillips v. United States, 312 U.S. 246, 251 (1941).

[16]The challenge must be based upon a provision of the Constitution other than the Supremacy Clause. Swift & Co. v. Wickham, 382 U.S. 111 (1965).

Id. at 326.[17] Likewise in Morales v. Turman, 430 U.S. 322 (1977) (per curiam), the Court emphasized that the threshold requirements for convening a three-judge court must be satisfied in the complaint, which must contain (1) a specific challenge to a state statute, rule or regulation, and (2) a request for an injunction against the enforcement of an identified law.[18] In rendering this holding in Morales, the Court relied on a decision reached a year earlier in Baxter v. Palmigiano, 425 U.S. 308 (1976).[19] Morales, 430 U.S. at 323 (citing Baxter,

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[17]In Costello this Court rejected the contention that a three-judge court was required because equitable relief for prison overcrowding might require suspending or superseding a state statute.

[18]The Court in Morales reversed a ruling that a three-judge court was required because a constitutional challenge to inhumane conditions maintained by state officials in Texas juvenile correctional facilities was effectively a challenge to a state-wide policy.

[19]Baxter involved a challenge to the denial of counsel and the use of a prisoner's silence against him in a prison disciplinary proceeding. The Court found that despite the fact that the state had detailed regulations governing prison disciplinary proceedings, the regulations did not address the right to counsel or the use of an (continued...)

425 U.S. at 313 n.2);[20] accord Butler v. Dexter, 425 U.S. 262 (1976) (per curiam).[21]

The record in this case makes clear that this threshold requirement was not met. Neither the original Complaint nor the Amended Complaint challenged any identified state constitutional provision, statute or regulation, nor was there any request to enjoin the enforcement of any identified state law (J.A. 153a-

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[19](...continued)
inmate's silence. "[The] complaint did not mention or challenge any rule or regulation of the Authority; nor did it seek an injunction against the enforcement of any identified rule." Baxter, 425 U.S. at 313 n.12. Thus, the Court concluded that a three-judge court was not required. Id.

[20]In the instant matter, had the Complaint in 1974 challenged the constitutionality of some provision of Louisiana law that purported explicitly to require racial segregation in the state's higher education system, a three-judge court still would not have been "required." Bailey v. Patterson, 396 U.S. 31 (1962)(where unconstitutionality is beyond dispute, single judge may enjoin state law).

[21]In Butler the Court held that it lacked jurisdiction of an appeal from an injunction granted by a three-judge court where local officials had acted unconstitutionally in using a state statute as a pretext for arrest and where no question of the constitutionality of the underlying statute was presented to the three-judge court.

183a). The United States' request for a three-judge court was admittedly founded not upon a direct attack to a state law on constitutional grounds, but rather on a claim that defendants' "acts and practices" in carrying out their duties were unconstitutional (J.A. 191a).

The State, through Governor Roemer, makes several novel arguments to support its claim that this Court does have direct appellate jurisdiction. For example, the Governor argues that this case is within the parameters of Section 2281 because it is a suit seeking to interpose the Constitution against enforcement of delegated legislation, in the form of the Board of Regents' Master Plan (Jurisdictional Statement of Governor Roemer at 11-12). The argument will not withstand scrutiny. The United States' specific complaint about the Master Plan was that it "fails to address the dismantling of the State's racially dual system of higher

education" (Appendix to Jurisdictional Statement of Governor Roemer [hereafter Roemer Appendix] at 69a).[22] Thus the challenge raised here is very much like that made in Costello, where effectively it was the absence of a policy that caused the condition that offended the Constitution.[23]

Here the Complaints allege that the absence of an affirmative policy to dismantle the dual system, combined with numerous decisions of the multiple administrative decision makers, creates the constitutionally offensive condition. The Complaints focus throughout on the establishment of the dual system and allege that the defendants have failed in their affirmative duty to provide

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[22]The 1974 Complaint identifies the Master Plan as simply a proposal (J.A. 162a). It clearly was not a statute or regulation, nor was it being challenged as such.

[23]Plaintiffs in Costello challenged the State's failure to provide medical services to prisoners and to deal adequately with overcrowding. See Costello v. Wainwright, 539 F.2d 547 (5th Cir. 1976).

specific measures and timetables to eliminate the continuing vestiges of that system (J.A. 162a [¶ 26], 177a [¶ 35]). The Complaints do not challenge as unconstitutional any policies or regulations of the Board of Regents (whether contained in its Master Plan or not), or of any other defendant, either on their face or as applied.[24]

This case thus is not about any particular policy or regulation, but rather about the cumulative effect of

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[24]Quoting ¶ 33 of the Amended Complaint, where the United States alleges that the Regents' Master Plan "would maintain and perpetuate the dual system of public higher education based upon race," the Governor characterizes the Master Plan as the equivalent of delegated legislation. (Jurisdictional Statement of Governor Roemer at 12 n.16.) However, while adoption of the Master Plan may not require legislative approval, implementation of its provisions is dependent upon appropriations decisions made by each session of the Louisiana Legislature, which determines whether or not to accept the recommendations of the Board of Regents. (See J.A. 317a-18a [United States' List of Material Facts to the Motion for Summary Judgment, ¶¶ 141-43, 147](referring to Board of Regents' funding recommendations and to disparities in legislative appropriations to historically white and black institutions); J.A. 119a, 122a [1974 Louisiana Constitution, Article VIII, §§ 5(D)(4), 11, 12](Board of Regents recommends funding formula but the Legislature makes discrete appropriations directly to individual institutional governing boards).)

scores of individual decisions by the Governor (who appoints members to the Board of Regents and the three institutional boards) and by each of these bodies which, collectively, perpetuate the State's dual system and thereby violate the Constitution (see Roemer Appendix at 66a-68a).

The State, through the Governor, also misconstrues the record in asserting that the United States directly challenged the 1974 Louisiana Constitution as violative of the federal Constitution (Jurisdictional Statement of Governor Roemer at 13). Relying on selected excerpts from the United States' Interrogatory Responses, the State attempts to construct a direct challenge to its Constitution which (1) does not appear in the original or amended Complaint in this case, and (2) is inconsistent with the United States' position that it is the action and inaction of the numerous decision-making

bodies (admittedly created by the State's Constitution), not their mere existence, that offends the Constitution (Roemer Appendix at 66a-68a). There is in this litigation no direct challenge to the State's Constitution or statutory provisions.

The State's attempt (again through the Governor) to distinguish Costello and Morales also is unavailing. Like Morales, there is no central body of written regulations or policies challenged by the United States in this case and, like Costello, it is the defendants' failure to act under the circumstances -- not the presence of any particular offending regulation or state policy -- that causes the violation.

Costello, Morales, Baxter, and Butler solidly establish that challenges, such as those made here, to multiple unwritten policies or practices of state officials in implementing their duties under state law, are not

required to be determined by a three-judge court. Thus the initial empaneling of the three-judge court was improper.

2. Moreover, when the case was reactivated after the Morales, Costello, Baxter, and Butler cases were decided in 1976 and 1977, the three-judge court should not have been reconvened as it was undoubtedly improper at that time.[25]

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[25]Evolution of three-judge court jurisdiction to its current narrow application grew out of a recognition by this Court and the Congress that the policy behind three-judge courts -- "saving state and federal statutes from improvident doom at the hands of a single judge," MTM, Inc. v. Baxley, 420 U.S. 799, 804 (1975), had become largely anachronistic. See Swift & Co. v. Wickham, 382 U.S. 111, 128-29 (1965) (noting that the three-judge procedure dislocates "the normal structure and function of the lower federal courts," "expands this Court's obligatory jurisdiction," and "contradicts the dominant principle of having this Court review decisions only after they have gone through two judicial sieves") (quoting Florida Lime & Avocado Growers, Inc. v. Jacobsen, 362 U.S. 73, 92-93 (1960) (Frankfurter, J. dissenting)). See also S. Rep. No. 94-202, 94th Cong., 2d Sess., 3-8, reprinted in 1976 U.S. Code Cong. & Admin. News 1988, 1990-96 (finding that the original rationale that gave rise to the three-judge court concept in 1910 had virtually disappeared). Thus, even before repeal of Section 2281 by the Congress, the Court increasingly limited three-judge court jurisdiction. E.g., Phillips v. United States, 312 U.S. 246 (1941); Swift & Co. v. Wickham, 382 U.S. 111 (1965); (continued...)

B. The Case Was Not Required To Be Heard By A Three-Judge Court Because A Single Judge Should Have Initially Resolved The Statutory Claim And Obviated Any Need For A Three-Judge Court.

In Hagans v. Lavine, 415 U.S. 528 (1974), decided on March 25, 1974, prior to the initial empaneling of the three-judge court in this case, the Court approved as "accurately reflecting recent jurisprudence" the practice of having a single judge initially determine the substantiality of the constitutional claim (as noted above, the threshold prerequisite for applicability of § 2281) and then resolve any statutory claims, convening a three-judge court thereafter and only if the case could not be disposed of on non-constitutional grounds.[26] Accord Rosado v.

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[25](...continued)
Gonzalez v. Automatic Employees Credit Union, 419 U.S. 90 (1974); MTM, Inc. v. Baxley, 420 U.S. 799 (1975).

[26]The Court in Hagans acknowledged that its holding "may appear at odds" with two prior opinions, Brotherhood of Locomotive Engineers v. Chicago, R.I. & P.R., 382 U.S. 423 (1966) and Florida (continued...)

Wyman, 397 U.S. 397, 403 (1970) (resolution of statutory claim initially by a single judge would avoid consuming the time of three federal judges in a matter not required to be determined by a three-judge court).[27] Under these precedents, the three-judge district court should have never been convened in this case.

This conclusion is further supported by the fact that the three-judge court was reconvened in order to reach a judgment that rests exclusively upon non-

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[26](...continued)
Lime & Avocado Growers v. Jacobsen, 362 U.S. 73 (1960), but it declined to follow them because it concluded that the Hagans holding "accurately reflects the recent evolution of three-judge-court jurisprudence." Hagans, 415 U.S. at 543-44. Both those earlier cases cited, however, do satisfy the threshold requirement (not met here) of a facial challenge to a state statute on constitutional -- non-Supremacy Clause -- grounds.

[27]In Philbrook v. Glodgett, 421 U.S. 707, 712 n.8 (1975), the Court excused the district court's failure to follow the procedure approved in Hagans because the complaint raised only constitutional claims and the statutory claim arose for the first time at oral argument before the three-judge court. Accord Alexander v. Fioto, 430 U.S. 634, 636 nn.6 & 7 (1977) (only basis of claim set out in the complaint was unconstitutionality of a statute).

constitutional grounds. See supra note 13. The Court has ruled repeatedly that a three-judge court is not required to render a ruling on a non-constitutional challenge to state law. Gonzalez v. Automatic Employees Credit Union, 419 U.S. 90 (1974), holds that denial, on non-constitutional grounds, of a requested injunction against a state law need not be issued by a three-judge court. Similarly, the Court ruled in MTM, Inc. v. Baxley, 420 U.S. 799 (1975), that a direct appeal under Section 1253 from the denial of an injunction was proper only where the three-judge court's order was based on the merits of a constitutional claim.[28]

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[28]See also United States v. Texas, 523 F. Supp. 703, 724-28 (E.D. Tex. 1981) (district court declined to request a three-judge court in action initiated prior to repeal of § 2281 where there was no direct attack on the constitutionality of a state statute and the court concluded it would be inappropriate to expand the parameters of § 2281 in light of the repeal); Bradley v. School Board of City of Richmond, 324 F. Supp. 396, 398 (E.D. Va. 1971) (district court declined to request a three-judge court because even if the relief ordered would require non-compliance with a state law, "such an (continued...)

Thus, a three-judge court was not "required" for the purpose of rendering the orders below and direct appeal under Section 1253 does not lie.

CONCLUSION

For these reasons, LDF urges the Court to dismiss this appeal and direct that the parties seek review in the United States Court of Appeals for the Fifth Circuit. LDF also urges the Court to exercise its authority under

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[28](...continued)
injunction would not necessarily be 'upon the ground of the unconstitutionality of such statute'"); accord United States v. Louisiana, 543 F.2d 1125 (5th Cir. 1976).

the All Writs Act, 28 U.S.C. § 1651, to maintain its stay of the district court's order during the pendency of the appellate proceedings.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF LOUISIANA, *ex rel.* WILLIAM J. GUSTE, JR., ATTORNEY GENERAL OF THE STATE OF LOUISIANA,
Appellant,

STATE OF LOUISIANA, *ex rel.* CHARLES E. "BUDDY" ROEMER, III, GOVERNOR OF THE STATE OF LOUISIANA, *et al.*,
Appellants,

BOARD OF SUPERVISORS OF SOUTHERN UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from a Three-Judge United States District Court for the Eastern District of Louisiana

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RESPONSE TO MOTION OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

Nos. 89-556, 89-557 and 89-771

STATE OF LOUISIANA, *ex rel.* WILLIAM J. GUSTE, JR., ATTORNEY GENERAL OF THE STATE OF LOUISIANA,
Appellant,

STATE OF LOUISIANA, *ex rel.* CHARLES E. "BUDDY" ROEMER, III, GOVERNOR OF THE STATE OF LOUISIANA, *et al.*,
Appellants,

BOARD OF SUPERVISORS OF SOUTHERN UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from a Three-Judge United States District Court for the Eastern District of Louisiana

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RESPONSE TO MOTION OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Respondent, the State of Louisiana ("State"), through its Governor, Charles E. "Buddy" Roemer, III, respectfully asks this Court to deny in part the Motion of the NAACP Legal Defense and Education Fund, Inc. for Leave to File Brief as *Amicus Curiae* Urging Dismissal

of Appeal, filed on December 8, 1989 ("LDF Motion and Brief").

The State consented to the filing by the NAACP Legal Defense and Education Fund, Inc. ("LDF") of a brief which dealt with the issue of whether this Court has jurisdiction to hear this case on direct appeal. LDF, however, has not limited its brief to the question of jurisdiction. Instead, LDF has gone beyond the issue to which consent was given by asking this Court "to exercise its authority under the All Writs Act, 28 U.S.C. § 1651, to maintain its stay of the district court's order during the pending of the appellate proceedings." LDF Motion and Brief at 28-29.

Moreover, Rule 44.4 of the Supreme Court Rules provides in part that "[a]n application for a stay or injunction to a Justice of this Court shall not be entertained, except in the most extraordinary circumstances, unless application for the relief sought first has been made to the appropriate court or courts below, or to a judge or judges thereof."

If this Court dismisses the appeal in the instant case for lack of jurisdiction, then the decision of the three-judge district court will be heard on appeal by the United States Court of Appeals for the Fifth Circuit. The court of appeals, however, has not been presented with an application for a stay of the district court's orders. *Cf. Dolman v. United States*, 439 U.S. 1395 (1978) (stay application denied under predecessor to Rule 44 because applicants failed to request stay from court of appeals). Additionally, applicants for the stay in the instant case have failed even to claim "most extraordinary circumstances."

Furthermore, LDF has strenuously argued that the Fifth Circuit's viewpoint is of the utmost importance in helping this Court reach a decision. *See* LDF Motion and Brief at 5 ("direct review from the district court's ap-

proval of the Special Master's report . . . would be imprudent and likely to impair this Court's ability fully to consider and resolve the weighty issues [involved]"). LDF, however, has failed to recognize that this same logic applies with equal force in regard to an application for a stay. LDF's own argument inescapably leads to the conclusion that in the instant case an application for a stay first should be filed with the court of appeals so this Court can benefit from its viewpoint.

For these reasons, the State requests this Court to deny that part of the LDF Motion and Brief asking the Court to maintain the current stay.

Respectfully submitted,

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Nos. 89-556, 89-557 and 89-771

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Appellant

v.

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Appellant

v.

UNITED STATES OF AMERICA

STATE OF LOUISIANA *ex rel.* CHARLES E. "BUDDY" ROEMER, III, *et al.*,
Appellant

v.

UNITED STATES OF AMERICA

On Appeal from the United States District Court for the Eastern District of Louisiana

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RESPONSE TO MOTION TO DISMISS

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

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v.

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BOARD OF SUPERVISORS OF SOUTHERN UNIVERSITY AND AGRICULTRUAL AND MECHANICAL COLLEGE, APPELLANT

v.

UNITED STATES OF AMERICA

STATE OF LOUISIANA EX REL. CHARLES E. "BUDDY" ROEMER, III, ET AL., APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

RESPONSE TO MOTION TO DISMISS

QUESTION PRESENTED

The question as presented by the United States is deemed adequate for purposes herein.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

No. 89-556

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APPELLANT

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UNITED STATES OF AMERICA

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BOARD OF SUPERVISORS OF SOUTHERN UNIVERSITY AND
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UNITED STATES OF AMERICA

89-771

STATE OF LOUISIANA EX REL. CHARLES E. "BUDDY" ROEMER, III,
ET AL., APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

RESPONSE TO MOTION TO DISMISS

NOW COMES the GRAMBLING STATE UNIVERSITY ALUMNI ASSOCIATION, through its counsel, THOMAS N. TODD, and hereby states that it joins the MOTION TO DISMISS the appeals in 89-556, 89-557 and 89-771, filed by the United States, December 1989, for the reasons stated therein.

Further, that for the purpose of this motion, the Statement, Argument and Conclusion of the United States are also adopted.

Respectfully submitted,

/S/
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UNIVERSITY ALUMNI ASSOCIATION

December 1989